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A JUDICIAL IMMUNITY

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 1482

A BILL TO AMEND TITLE 18 AND TITLE 28, UNITED STATES CODE, TO MAKE CERTAIN IMPROVEMENTS WITH RESPECT TO THE FEDERAL JUDICIARY, AND FOR OTHER PURPOSES

S. 1512

A BILL TO PROVIDE THAT IN JUDICIAL ACTIONS AGAINST STATE JUDGES, SUCH JUDGES SHALL NOT BE HELD LIABLE FOR ATTORNEY FEES

AND

S. 1515

A BILL TO PROHIBIT INJUNCTIVE RELIEF, OR AN AWARD OF DAMAGES AGAINST A JUDICIAL OFFICER FOR ACTION TAKEN IN AN OFFICIAL CAPACITY

FEBRUARY 26, 1988

Serial No. J-100-51

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S521-30

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Heflin, Hon. Howell, a U.S. Senator from the State of Alabama 1
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa 49
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina 257

PROPOSED LEGISLATION

S. 1482, a bill to amend title 18 and title 28, United States Code, to make certain improvements with respect to the Federal judiciary, and for other purposes 3
S. 1512, a bill to provide that in judicial actions against State judges, such judges shall not be held liable for attorney fees 45
S. 1515, a bill to prohibit injunctive relief, or an award of damages against a judicial officer for action taken in an official capacity 47

CHRONOLOGICAL LIST OF WITNESSES

Murray, Hon. Florence K., Supreme Court of Rhode Island 49
Jones, Kevin, Deputy Assistant Attorney General, Office of Legal Policy 52
Panel consisting of Hon. George E. Danielson, Associate Justice of the California Court of Appeals, on behalf of the Judicial Conference of the United States; Hon. Edwin J. Peterson, Chief Justice, Supreme Court of Oregon, on behalf of the Conference of Chief Justices; and Hon. Ira Raab, Chair, Legislative Committee, on behalf of the American Judges Association 69
Panel consisting of Hon. Joseph R. Weisberger, Justice, Supreme Court of Rhode Island; Hon. Phillip J. Roth, Circuit Court of Oregon; and Thomas A. Harnett, attorney, on behalf of the American Bar Association 212
Halperin, Morton H., director, Washington Office, American Civil Liberties Union 264

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Danielson, Hon. George E.:
  Testimony 69
  Prepared statement 72
  Letter with attachments, March 7, 1988 203
Halperin, Morton H.:
  Testimony 264
  Prepared statement 268
  Letter from Alliance for Justice, March 14, 1988 274
  Forrester v. *White*, U.S. Supreme Court opinion, argued November 2, 1987—decided January 12, 1988 276
Harnett, Thomas A.:
  Testimony 216
  Prepared statement 217
Heflin, Hon. Howell: Statement submitted by the NAACP Legal Defense and Educational Fund, Inc 261
Jones, Kevin:
  Testimony 52
  Prepared statement 55
  Questions and answers 66
Murray, Hon. Florence K.:
  Testimony 49

Page
Murray, Hon. Florence K.—Continued
  Prepared statement ... 50
Peterson, Hon. Edwin J.:
  Testimony ... 84
  Prepared statement ... 86
  Responses to questions from:
    Senator Grassley ... 117
    Senator Thurmond ... 123
  "Task Force to Prepare a Report on the Impact of *Pulliam* v. *Allen*, updated report, September 1985 ... 134
    Appendix A: First Report of *Pulliam* v. *Allen* Task Force, February 13, 1985 ... 184
    Appendix B: Letter and questionnaire requesting information ... 194
Raab, Hon. Ira J.:
  Testimony ... 127
  Prepared statement, with attached resolutions ... 128
Roth, Hon. Phillip:
  Testimony ... 214
  Prepared statement ... 217
  Responses to questions from Senators Thurmond and Grassley ... 254
Weisberger, Hon. Joseph R.:
  Testimony ... 212
  Prepared statement ... 217
  "The Twilight of Judicial Independence—*Pulliam* v. *Allen*," article from the Suffolk University Law Review, vol. XIX:537, 1985 ... 228
  Letter to Senator Heflin, March 15, 1988, in response to written questions ... 252

A JUDICIAL IMMUNITY

FRIDAY, FEBRUARY 26, 1988

U.S. Senate,
Subcommittee on Courts and Administrative Practice,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senators Grassley and Thurmond.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator Heflin. I would like to welcome you to the subcommittee hearing on judicial immunity.

In 1868, the need for judicial immunity was explained in the following manner:

> It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor, without fear.
>
> This provision of the law is not for the protection nor the benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences.

Although the statement was written 120 years ago, I believe it is just as applicable today as it was then. Certainly, judicial independence is no less important today than it was in 1868.

Unfortunately, this independence has been severely eroded by the U.S. Supreme Court decision in *Pulliam* v. *Allen.*

In that case the Supreme Court held that the doctrine of judicial immunity is not a bar to injunctive relief in Federal civil rights actions against a member of the State judiciary acting in a judicial capacity nor is it a bar to the award of attorneys' fees against the judge.

This decision has caused tremendous concern among our Nation's judicial officers. In fact, the Nation's leading bar and court organizations, the American Bar Association, Conference of Chief Justices, the Judicial Conference of the United States, and the American Judges Association have all adopted resolutions calling for legislation to reverse the *Pulliam* decision.

Three bills, S. 1482, S. 1512, and S. 1515 were introduced in this Congress to do just that. These bills represent a range of solutions from the most restrictive in S. 1482, to the most comprehensive in S. 1515.

These bills were introduced to provide a vehicle to discuss the impact of *Pulliam* on our judicial system, not just its near-term effect, but its long-term effect as well.

[Copies of S. 1482, S. 1512, and S. 1515 follow:]

II

100th CONGRESS
1st Session

S. 1482

To amend title 18 and title 28, United States Code, to make certain improvements with respect to the Federal judiciary, and for other purposes.

IN THE SENATE OF THE UNITED STATES

July 10 (legislative day, June 23), 1987

Mr. Heflin (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18 and title 28, United States Code, to make certain improvements with respect to the Federal judiciary, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Branch Improvements Act of 1987".

TITLE I—MANDATORY JURISDICTION OF THE SUPREME COURT

SHORT TITLE

Sec. 101. This title may be cited as the "Supreme Court Mandatory Appellate Jurisdiction Reform Act of 1987".

REVIEW OF DECISIONS INVALIDATING ACTS OF CONGRESS

SEC. 102. Section 1252 of title 28, United States Code, and the item relating to that section in the section analysis of chapter 81 of such title, are repealed.

REVIEW OF DECISIONS INVALIDATING STATE STATUTES

SEC. 103. (a) Section 1254 of title 28, United States Code, is amended by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2).

(b) The section heading for section 1254 of such title is amended by striking out "appeal;".

(c) The item relating to section 1254 in the section analysis of chapter 81 of title 28, United States Code, is amended by striking out "appeal;".

REVIEW OF STATE COURT DECISIONS INVOLVING VALIDITY OF STATUTES

SEC. 104. Section 1257 of title 28, United States Code, is amended to read as follows:

"§ 1257. State courts; certiorari

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

"(b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.".

REVIEW OF DECISIONS FROM SUPREME COURT OF PUERTO RICO

SEC. 105. Section 1258 of title 28, United States Code, is amended to read as follows:

"§ 1258. Supreme Court of Puerto Rico; certiorari

"Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico or of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.".

CONFORMING AMENDMENTS

SEC. 106. (a) The items relating to sections 1257 and 1258 in the section analysis of chapter 81 of title 28, United States Code, are amended to read as follows:

"1257. State courts; certiorari.
"1258. Supreme Court of Puerto Rico; certiorari.".

(b) Section 2101(a) of title 28, United States Code, is amended by striking out "sections 1252, 1253 and 2282" and inserting in lieu thereof "section 1253".

(c) Section 2103 of title 28, United States Code, is repealed.

(d)(1) Section 2104 of title 28, United States Code, is amended to read as follows:

"§ 2104. Review of State court decisions

"A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.".

(2) The item relating to section 2104 in the section analysis of chapter 133 of title 28, United States Code, is amended to read as follows:

"2104. Review of State court decisions.".

(e) Section 2350(b) of title 28, United States Code, is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

AMENDMENTS TO OTHER LAWS

SEC. 107. (a) Section 310 of the Federal Election Campaign Act (2 U.S.C. 437h) is amended by repealing subsection (b).

(b) Section 2 of the Act of February 11, 1903, commonly known as the Expediting Act (15 U.S.C. 29), as amended, is amended—

(1) by striking out "(a)" immediately before "Except"; and

(2) by repealing subsection (b).

(c) The last sentence of section 203(d) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1652(d)) is amended to read as follows: "An interlocutory or final judgment, decree, or order of such district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.".

(d) Section 209(e)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(e)(3)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(e) Section 303(d) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743(d)) is amended to read as follows:

"(d) REVIEW.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States. Such review is exclusive, and any such petition shall be filed in the Supreme Court not more than twenty days after entry of such finding or determination.".

(f) Section 1152(b) of the Omnibus Budget Reconciliation Act of 1981 (45 U.S.C. 1105(b)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(g) Section 206 of the International Claims Settlement Act of 1949 (22 U.S.C. 1631e) is amended by striking out "1252, 1254, 1291," and inserting in lieu thereof "1291".

(h) Section 12(a) of the Act of May 13, 1954, commonly known as the Saint Lawrence Seaway Act (33 U.S.C. 988(a)), is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

(i) Section 25(a)(4)(E) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136w(a)(4)(E)) is repealed.

(j) Section 21(f)) of the Federal Trade Commission Improvements Act of 1980 (15 U.S.C. 57a-1(f)) is repealed.

(k) Section 12(e) of the Coastal Zone Management Improvement Act of 1980 (16 U.S.C. 1463a(e)) is repealed.

EFFECTIVE DATE

SEC. 108. The amendments made by this title shall take effect ninety days after the date of the enactment of this Act, except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date.

TITLE II—JURY SELECTION AND SERVICE AMENDMENTS

SHORT TITLE

SEC. 201. This title may be cited as the "Jury System Improvements Act of 1987."

EXCUSE OF JURORS

SEC. 202. Section 1866(c)(1) of title 28, United States Code, is amended to read as follows: "(1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service under subsections (b) and (c) of this section, or, if the court's jury selection plan so provides, the name of such person shall be reinserted into the qualified jury wheel for selection pursuant to subsection (a) of this section,".

JURY SELECTION PLAN AMENDMENTS

SEC. 203. Section 1863(b) of title 28, United States Code, is amended by—

(1) striking out the words "or clerk" in paragraph (3) and inserting in lieu thereof ", clerk or other persons authorized by the court"; and

(2) amending paragraph (6) to read as follows:

"(6) specify that the following persons are barred from jury service on the ground that they are exempt (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.".

MASTER JURY WHEEL AMENDMENT

SEC. 204. The second sentence of section 1864(a) of title 28, United States Code, is amended to read as follows:

"The clerk or jury commission shall possess the capability to prepare upon order of the court an alphabetical list of the names drawn from the master jury wheel. Any list so prepared shall not be disclosed to any person except pursuant to the district court plan and to section 1867 and 1868 of this title.".

TECHNICAL AMENDMENT

SEC. 205. The second sentence of section 1865(a) of title 28, United States Code, is amended by deleting the words "the alphabetical" and inserting in lieu thereof the following, "in any alphabetical".

EXPERIMENTAL JURY SELECTION PROCEDURES

SEC. 206. (a) Chapter 121 of title 28, United States Code, is amended by adding at the end thereof the following section:

"§ 1878. Experimental use of new jury selection procedures

"(a) The Judicial Conference of the United States is authorized to permit district courts to experiment with new jury selection procedures, notwithstanding that such new procedures may be inconsistent with the provisions of this chapter. No such experiment shall be authorized, however, unless the Judicial Conference certifies that the experiment will not violate the policies and objectives set forth in sections 1861 and 1862 of this title, and no such experiment may be conducted for a period of longer than two years. The Judicial

Conference must specify the exact number of district courts to participate in an experiments but in no event shall the number of courts participating in any one experiment exceed ten. The Conference shall terminate any experiment immediately upon determining that the policies and objectives of section 1861 and 1862 are being violated, or whenever in its judgment good cause for such termination exists. Permanent implementation of any experiment may be effectuated only through an amendment to chapter 121 of this title.

"(b) No challenge under section 1867 of this title shall lie on the basis that a jury was selected in accordance with an experiment conducted pursuant to this section.".

(b) The chapter analysis of chapter 121 of title 28, United States Code, is amended by inserting at the end thereof, "1878. Experimental use of new jury selection procedures.".

EFFECTIVE DATE

SEC. 207. This title and the amendments made by this title shall take effect on the date of enactment of this Act.

TITLE III—COURT-ANNEXED ARBITRATION

SHORT TITLE

SEC. 301. This title may be cited as the "Court-Annexed Arbitration Act of 1987".

AMENDMENT TO AUTHORIZE COURT-ANNEXED ARBITRATION

SEC. 302. Title 28, United States Code, is amended by—

(A) adding after chapter 175 the following new chapter:

"CHAPTER 177—ARBITRATION

"Sec.
"3101. Establishment of an arbitration program.

"§ 3101. Establishment of an arbitration program

"A program of court-annexed arbitration may be established, on an experimental basis, in each judicial district by local rule with the approval of the judicial council of the circuit.".

(b) amending the chapter analysis for part VI by adding the following:

"177. Arbitration .... 3101".

JUDICIAL CONFERENCE MODEL PROCEDURES

SEC. 303. The Judicial Conference of the United States may develop model procedures for the conduct of arbitration proceedings under this title.

AUTHORIZATION FOR APPROPRIATIONS

SEC. 304. There are authorized to be appropriated to the judicial branch of Government such sums as may be necessary to carry out the provisions of this title. Such sums are to remain available until expended.

EFFECTIVE DATE

SEC. 305. The amendment made by this title shall take effect on the date of enactment of this Act.

TITLE IV—DISTRICT COURT EXECUTIVE

SHORT TITLE

SEC. 401. This title may be cited as the "District Court Executive Act of 1987".

DISTRICT COURT EXECUTIVE

SEC. 402. Chapter 49 of title 28, United States Code, is amended by redesignating section 756 as section 757 and inserting the following new section 756:

"§ 756. District court executive

"(a) Each district court with eight district judgeships or more may, with the approval of the judicial council of the circuit, appoint a district court executive. The district court executive shall serve at the pleasure of the court.

"(b) A district court executive shall be certified as qualified by the Board of Certification provided by section 332(f) of this title before being appointed under this section.

"(c) The district court executive shall exercise, under the general supervision of the chief judge, such administrative powers and perform such duties as may be delegated to him by the district court, which may include, but need not be limited to:

"(1) Arranging and attending meetings, preparing agendas, and serving as secretariat to ad hoc or standing committees of the judges established for the administration of specific programs or to resolve procedural or policy issues.

"(2) Implementing and insuring compliance with any rules, regulations, or order of the court.

"(3) Reviewing and recommending changes in the local rules, the Jury Selection and Service Act plan, the speedy trial plan, the plan for representation of persons under the Criminal Justice Act, and other internal operating plans of the court.

"(4) Serving as public relations officer and representing the court as its liaison to the courts of the State, bar associations, civic groups, the news media, and other public and private groups having an interest in the administration of the court.

"(5) Administering the court's personnel system in accordance with the Judiciary salary plan and rules and regulations promulgated by the Judicial Conference of the United States.

"(6) Serving as the court's equal employment opportunity coordinator and being responsible for supervising the processing of any discrimination complaints and grievances by court personnel.

"(7) Developing and implementing training programs for court personnel in conjunction with seminars and other education programs conducted under the auspices of the Federal Judicial Center.

"(8) Supervising court reporters and court interpreters and arranging for contractual services as necessary, subject to the approval of the Judicial Council and under such terms and conditions as may be prescribed by the Judicial Conference of the United States.

"(9) Formulating the annual budget of the court for submission to the Administrative Office and the appropriate committees of the Judicial Conference and reviewing and evaluating requests for additional personnel from each of the organizational units of the court to ensure compliance with standards adopted by the Judicial Conference.

"(10) Establishing and maintaining a space management program to ensure maximum utilization of courtrooms and other facilities and serving as liaison officer with the General Services Administration (GSA) and the Administrative Offices with respect to the acquisition of additional space and processing of work authorizations for tenant alterations and other reimbursable services by GSA.

"(11) Assisting in the formulation of the court's security program.

"(12) Serving as the court's furniture liaison officer and being responsible for the apportionment and allocation of funds made available for that purpose.

"(13) Establishing and maintaining property control records and processing requests for general office equipment, lawbooks, and other accountable property.

"(14) Administering the program for the admission of attorneys to the bar and any disciplinary procedures that may be adopted by the court and maintaining a roster and arranging for dissemination of the local rules, opinions, and other material of interest to the bar.

"(15) Conducting studies relating to the business and administration of the court and preparing appropriate recommendations and reports for the chief judge.

"(16) Performing such other duties as may be assigned by the court and the chief judge.

"(d) Each district court executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level V of the Executive Schedule (5 U.S.C. 5316).

"(e) The district court executive may appoint, with the approval of the district court, necessary employees in such numbers as may be approved by the Director of the Administrative Office of the United States Courts. The district court executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to Civil Service Retirement), chapter 84 (relating to the Federal Employees' Retirement System), chapter 87 (relating to Federal employees' life insurance), and chapter 89 (relating to Federal employees' health benefits) of title 5, United States Code.".

SECTION ANALYSIS

SEC. 403. The table of sections of chapter 49 of title 28, United States Code, is amended by deleting the item relating to section 756 and by inserting in lieu thereof new items as follows:

"756. District Court Executive.
"757. Power to appoint.".

EFFECTIVE DATE

SEC. 404. This title and the amendments made by this title shall take effect on the first day of the fiscal year immediately following the date of enactment of this Act.

TITLE V—FEDERAL JUDICIAL CENTER AMENDMENTS

PART A—FEDERAL JUDICIAL CENTER FOUNDATION

SHORT TITLE

SEC. 501. This Part may be cited as the "Federal Judicial Center Foundation Act of 1987".

FEDERAL JUDICIAL CENTER FOUNDATION

SEC. 502. Chapter 42 of title 28, United States Code, is hereby amended by adding at the end thereof the following new section:

"§ 629. Federal Judicial Center Foundation

"(a) There is established a private nonprofit corporation which shall be known as the Federal Judicial Center Foundation (the 'Foundation') and which shall be incorporated in the District of Columbia. The purpose of the Foundation shall be to have sole authority to accept and receive gifts of property, both real and personal, and services made for the purpose of aiding or facilitating the work of the Center. The Foundation shall not accept conditional or otherwise restricted gifts: *Provided, however,* That gifts that are designated for the support of specific projects previously approved by the Board of the Center may be accepted. The Foundation shall have no authority to administer or otherwise determine the use of gifts accepted pursuant to the authority granted in this section.

"(b) The business of the Foundation shall be conducted by a Board that shall have seven members, including a chairman. Three members, including the chairman, shall be appointed by the Chief Justice of the United States, two by the President pro tempore of the Senate and two by the Speaker of the House of Representatives. Terms of office shall be five years, except that the initial terms shall be five years for the

Chairman, one member appointed by the President pro tempore and one member appointed by the Speaker, three years for the other member appointed by the President pro tempore and the other member appointed by the Speaker, and two years for the two other members appointed by the Chief Justice. Members of the Board shall serve without compensation, but, upon authorization of the Director of the Center, shall be reimbursed by the Center for actual and necessary expenses incurred in the performance of their official duties. No person who is a Federal or State judge, in regular active service or otherwise eligible to perform judicial duties, shall be eligible for membership on the Board. The Center shall provide all administrative support and facilities necessary to the operation of the Board.

"(c) The Center is hereby authorized to administer and utilize gifts received by the Foundation under the authority granted in this section. Subject only to the condition that gifts will be used to further Center goals, the Board of the Center shall have sole authority to determine the manner in which gifts shall be used.

"(d) Gifts of money and proceeds from sales of other property received as gifts shall be deposited in a separate fund in the Treasury of the United States and disbursed on the order of the Director of the Center, in accordance with policies established by the Board of the Center.

"(e) The Board of the Foundation shall prepare an annual report to the Committees on the Judiciary of the United States Senate and House of Representatives with respect to gifts received during the year covered by the report under the authority granted in this section, including the source of each such gift, the amount of each gift of cash or cash equivalent and a description of each other gift. The Center shall include in its annual report of the activities of the Center a description of the purposes for which gifts or gift funds were used during the year covered by the report.

"(f) For the purpose of Federal income, estate and gift taxes, property accepted under the authority granted in this section shall be considered as a gift or bequest to or for the use of the United States.".

SECTION ANALYSIS

SEC. 503. The table of sections of chapter 42 of title 28, United States Code, is amended by deleting the item relating to section 629 and inserting in lieu thereof:

"629. Federal Judicial Center Foundation.".

EFFECTIVE DATE

SEC. 504. The amendment made by this part shall take effect on the date of enactment of this Act.

PART B—HISTORY PROGRAM IN THE JUDICIAL BRANCH

DUTIES OF THE BOARD

SEC. 510. Section 623(a) of title 28, United States Code, is amended—

(1) by deleting "and" at the end of paragraph (5);

(2) by deleting the period at the end of paragraph (6);

(3) by adding "; and" at the end of paragraph (6); and

(4) by adding new paragraph (7) as follows:

"(7) conduct, coordinate, and encourage programs to collect, preserve, and make available materials relating to the history of the judicial branch of the United States Government.".

EFFECTIVE DATE

SEC. 511. The amendments made by this part shall take effect on the date of enactment of this Act.

PART C—TRAINING FOR NON-GOVERNMENTAL EMPLOYEES

FUNCTIONS OF THE FEDERAL JUDICIAL CENTER

SEC. 520. Section 620(b)(3) of title 28, United States Code, is amended to read as follows:

"(3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the government and other persons whose participation in such programs would improve the operation of the judicial branch, including, but not limited to, judges, United States magistrates, clerks of court, probation officers, and persons serving as mediators and arbitrators;".

EFFECTIVE DATE

SEC. 521. The amendments made by this part shall take effect on the date of enactment of this Act.

PART D—POWERS OF THE BOARD AND COMPENSATION OF THE DEPUTY DIRECTOR

APPOINTMENT OF THE DEPUTY DIRECTOR

SEC. 531. Section 624 of title 28, United States Code, relating to powers of the Board of the Federal Judicial Center, is amended in paragraph (1) by inserting "and the Deputy Director" after "Director".

COMPENSATION OF THE DEPUTY DIRECTOR

SEC. 532. Chapter 42 of title 28, United States Code, is amended by—

(1) adding a new sentence at the end of section 626 as follows: "The compensation of the Deputy Director of the Federal Judicial Center shall be the same as that of the Deputy Director of the Administrative Office.";

(2) by amending the section title to section 626 to read "Compensation of the Director and Deputy Director"; and

(3) by amending the item relating to section 626 in the section analysis of chapter 42 of title 28, United States Code, to read as follows:

"626. Compensation of the Director and Deputy Director.".

EFFECTIVE DATE

SEC. 533. The amendments made by this part shall be effective on the date of enactment of this Act.

TITLE VI--MISCELLANEOUS PROVISIONS

DIVISIONAL VENUE IN CIVIL CASES

SEC. 601. (a) REPEAL OF SECTION 1393 OF TITLE 28, UNITED STATES CODE.—Section 1393 of title 28, United States Code, which provides for divisional venue in civil cases, is repealed.

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect ninety days after the date of enactment of this Act.

REGISTRATION OF FOREIGN JUDGMENTS

SEC. 602. (a) AMENDMENTS TO SECTIONS 1963 AND 1963A OF TITLE 28, UNITED STATES CODE.—Chapter 125 of title 28, United States Code, is amended—

(1) by amending the first sentence of section 1963 to read: "A judgment in an action for the recovery of money or property entered in any district court or in the Court of International Trade may be registered by filing a certified copy of such judgment in any other district, or with respect to the Court of International Trade in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown.";

(2) by repealing section 1963A;

(3) by amending the title to section 1963 to read "Registration of judgments of the district courts and the Court of International Trade"; and

(4) by amending the chapter analysis relating to sections 1963 and 1963A to read—

"1963. Registration of judgments of the district courts and the Court of International Trade.
"[1963A. Repealed.]".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect ninety days after the date of enactment of this Act.

DIVERSITY IN CASES INVOLVING REPRESENTATIVE PARTIES

SEC. 603. (a) AMENDMENT TO SECTION 1332 OF TITLE 28, UNITED STATES CODE.—Section 1332(c) of title 28, United States Code, is amended to read as follows:

"(c) For the purposes of this section and section 1441 of this title—

"(1) a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

"(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or imcompetent.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to claims in civil actions commenced in or removed to the United States district courts on or after the 90th day after the date of enactment of this Act.

BANKRUPTCY JUDGE, MAGISTRATE AND LAW CLERK EXEMPTION FROM FEDERAL LEAVE ACT

SEC. 604. (a) AMENDMENTS TO SECTIONS 153, 156, 631, 634, 712, 752, AND 794, OF TITLE 28, UNITED STATES CODE.—Title 28 of the United States Code is amended—

(1) by adding a new subsection (d) to section 153 as follows:

"(d) A bankruptcy judge appointed under this chapter shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code.";

(2) by adding a new subsection (l) to section 631 as follows:

"(l) A United States magistrate appointed under this chapter shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code.";

(3) by adding at the end thereof the following sentence to sections 156(a), 712, 752 and 794: "A law clerk appointed under this section shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code."; and

(4) by adding at the end thereof the following sentence to section 634(c): "A legal assistant appointed under this section shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

COST-OF-LIVING ADJUSTMENT OF ANNUITIES PAYABLE UNDER SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE

SEC. 605. (a) AMENDMENTS TO SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE.—Sections 611 and 627 of title 28, United States Code, are amended by adding at the end thereof a new paragraph denominated as sections 611(e) and 627(f), respectively, reading as follows:

"Each annuity payable under this section shall be increased by the same percentage amount and effective on the same date as annuities payable under chapter 83 of title 5, United States Code, are increased as provided by section 8340 of title 28, United States Code.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to cost-of-living increases that go into effect on or after the date of enactment of this Act with respect to any annuity being paid or becoming payable on or after such date.

MILITARY RETIREMENT PAY FOR SENIOR OR RETIRED JUDGES

SEC. 606. (a) AMENDMENTS TO SECTION 371 OF TITLE 28, UNITED STATES CODE.—Section 371 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) Notwithstanding subsection (c) of section 5532 of title 5, United States Code, if a regular or reserve member or former member of a uniformed service who is receiving retired or retainer pay becomes employed as a justice or judge of the United States, as defined by section 451 of title 28, or becomes eligible therefor while so employed, such retired or retainer pay shall not be paid during regular active service as a justice or judge, but shall be resumed or commenced without reduction upon retirement from the judicial office or from regular active service (into senior status) as such justice or judge.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to a justice or judge who retires, or has retired, from the judicial office or from regular active service (into senior status) as such justice or judge of the United States on or after the effective date of section 5532(c) of title 5, United States Code, and to whom section 5532(c) would otherwise be applicable.

CERTIFICATE OF PROBABLE CAUSE UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE

SEC. 607. (a) AMENDMENTS TO SECTION 2255 OF TITLE 28, UNITED STATES CODE, AND FEDERAL RULES OF APPELLATE PROCEDURE.—Section 2255 of title 28, United States Code, is amended by adding the following new sentence to the end of the sixth paragraph thereof: "An appeal may not be taken from such order unless the justice or judge who rendered the order, or a circuit justice or judge, issues a certificate of probable cause.".

(b) Rule 22 of the Federal Rules of Appellate Procedure is amended by—

(1) striking the division title and inserting in lieu thereof

"Rule 22. Habeas Corpus and Section 2255 Proceedings";

(2) inserting "and in a motion proceeding pursuant to section 2255 of title 28, United States Code," after "State court," in the first sentence in subdivision (b); and

(3) deleting "for the writ" in the fourth sentence of subdivision (b).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to section 2255 proceedings commenced in the United States district courts on or after the ninetieth day after the date of enactment of this Act.

EXHAUSTION OF STATE REMEDIES UNDER SECTION 2254 OF TITLE 28, UNITED STATES CODE

SEC. 608. (a) AMENDMENT TO SECTION 2254 OF TITLE 28, UNITED STATES CODE.—Section 2254(b) of title 28, United States Code, is amended by adding the following new sentence to the end thereof: "An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect ninety days after the date of enactment of this Act.

AMENDMENTS TO CONFORM SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE TO THE FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

SEC. 609. (a) AMENDMENTS TO SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE.—Title 28 of the United States Code is amended by—

(1) amending section 611(a) to read as follows:

"The Director may, by written election filed with the Chief Justice of the United States within six months after the date on which he takes office, waive coverage under chapter 83 of title 5, United States Code, subchapter III (the Civil Service Retirement System) or chapter 84 of title 5, United States Code (the Federal Employees' Retirement System), whichever is applicable, and bring himself within the purview of this section. A Director who elects coverage under this section shall be deemed an 'employee' for purposes of chapter 84 of title 5, United States Code, subchapter III, regardless of whether he has waived the coverage of chapter 83, subchapter III, or chapter 84. Waiver of coverage under chapter 83, subchapter III, and election of this section shall not operate to foreclose to the Director, upon separation from service other than by retirement, such opportunity as the law may provide to secure retirement credit under chapter 83 for service as Director by depositing with interest the amount required by section 8334 of title 5, United States Code. A Director who waives coverage under chapter 84 and elects this section may secure retirement credit under chapter 84 for service as Director by depositing with interest 1.3 percent of basic pay for service from January 1, 1984, through December 31, 1986, and the amount referred to in section 8422(a) of title 5, United States Code, for service after December 31, 1986. Interest shall be computed under section 8334(e) of title 5, United States Code."; and

(2) amending section 627(b) following the words "*Provided, however,*" to read as follows: "That the Director, upon written notice filed with the Director of the Administrative Office of the United States Courts within six months after the date on which he takes office, may waive coverage under chapter 83 of title 5, United States Code, subchapter III (the Civil Service Retirement System) or chapter 84 of title 5, United States Code (the Federal Employees' Retirement System), whichever is applicable, and elect coverage under the retirement and disability provisions of this section. A Director who elects coverage under this section shall be deemed an 'employee' for purposes of chapter 84 of title 5, United States Code, subchapter III, regardless of whether he has waived the coverage of chapter 83, subchapter III, or chapter 84. *And provided further,* That upon his nonretirement separation from the Federal Judicial Center, waiver of coverage under chapter 83, subchapter III, and election of this section shall not operate to foreclose to the Director such opportunity as the law may provide to secure re-

tirement credit under chapter 83 for service as Director by depositing with interest the amount required by section 8334 of title 5, United States Code. A Director who waives coverage under chapter 84 and elects this section may secure retirement credit under chapter 84 for service as Director by depositing with interest 1.3 percent of basic pay for service from January 1, 1984, through December 31, 1986, and the amount referred to in section 8422(a) of title 5, United States Code for service after December 31, 1986. Interest shall be computed under section 8334(e) of title 5, United States Code.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to persons holding the offices of Director of the Administrative Office of the United States Courts, Director of the Federal Judicial Center, and Administrative Assistant to the Chief Justice on the date of enactment of this Act.

JUDICIAL DISQUALIFICATION AMENDMENT

SEC. 610. (a) AMENDMENT TO SECTION 455 OF TITLE 28, UNITED STATES CODE.—Section 455 of title 28, United States Code, is amended by adding a new subsection at the end thereof as follows:

"(f) Notwithstanding the foregoing provisions, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance, after the matter was assigned to him, of a party in which he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest (other than an interest that could be substantially affected by the outcome), a waiver of disqualification may be accepted from the parties; in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay or reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of enactment of this Act.

SERVICE OF ARTICLE III JUDGES ON TERRITORIAL COURTS

SEC. 611. (a) AMENDMENT TO SECTION 291 OF TITLE 28, UNITED STATES CODE.—Section 291 of title 28, United States Code, is amended by adding the following new subsection at the end thereof:

> "(c) The chief judge of the United States Court of Appeals for the Ninth Circuit may assign any circuit or district judge of the Ninth Circuit, with the consent of the judge so assigned, to serve temporarily as a judge of any duly constituted court of the Marshall Islands, the Federal States of Micronesia, or Palau whenever an official duly authorized by the laws of the respective

compact state requests such assignment and such assignment is necessary for the proper dispatch of the business of the respective court.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of enactment of this Act.

CIRCUIT JUDICIAL CONFERENCE AMENDMENTS

SEC. 612. (a) AMENDMENTS TO 28 SECTION 333 OF TITLE 28, UNITED STATES CODE.—Section 333 of title 28, United States Code, is amended as follows:

(1) in the first sentence of the first paragraph by striking out "annually" and inserting in lieu thereof "biennially, and may summon annually,";

(2) in the last sentence of the first paragraph by striking out "the United States district court for the district of the Canal Zone,"; and

(3) in the last sentence of the first paragraph by striking out "annually" and inserting in lieu thereof "biennially, and may be summoned annually,".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

INCENTIVE AWARDS

SEC. 613. (a) AMENDMENT TO 28 SECTION 604 OF TITLE 28, UNITED STATES CODE.—Section 604 of title 28, United States Code, is amended by inserting after the term "compensation" the first time it appears in paragraph (5) the following: ", including a program of incentive awards,".

(b) **Effective Date.**—The amendments made by this section shall take effect on the date of enactment of this Act.

JUDICIAL IMMUNITY

Sec. 614. (a) **Amendment to Section 722 of the Revised Statutes (42 U.S.C. 1988).**—Section 722 of the Revised Statutes, as amended, is amended by striking the period at the end thereof and inserting at the end the following language: ", *Provided:* That no such fees shall be awarded against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made.".

(b) **Effective Date.**—The amendment made by this section shall take effect on the date of enactment of this Act.

WAIVER OF CLAIMS FOR OVERPAYMENT OF JUDICIAL PAY AND ALLOWANCES

Sec. 615. (a) **Amendments to Section 5584 of Title 5, United States Code.**—Section 5584(g) of title 5, United States Code, is amended—

(1) in paragraph (4) by striking out "and";

(2) by striking out the period at the end of paragraph (5) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following:

"(6) the Administrative Office of the United States Courts, the Federal Judicial Center, and any of the courts set forth in section 610 of title 28.

For purposes of this section, the Director of the Administrative Office of the United States Courts shall be the head of the agency in the case of those entities set forth in paragraph (6) of this section.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to erroneous payments made on or after the date of enactment of this Act.

IMPROVEMENT OF THE APPEALS PROCESS WITH RESPECT TO ARBITRATION

SEC. 616. (a) AMENDMENT TO TITLE 9.—Chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new section:

"§ 15. Appeals

"(a) An appeal may be taken from—

"(1) an order—

"(A) refusing a stay of any action under section 3 of this title;

"(B) denying an application to compel arbitration under section 4 or 206 of this title;

"(C) confirming or denying confirmation of an award or partial award;

"(D) modifying, correcting, or vacating an award;

"(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; and

"(3) a final decision with respect to an arbitration that is subject to this title.

"(b) Except as otherwise provided in section 1292(b) of title 28, United States Code, an appeal may not be taken from an interlocutory order—

"(1) granting a stay of any action under section 3 of this title;

"(2) compelling arbitration under section 4 or 206 of this title; or

"(3) refusing to enjoin an arbitration that is subject to this title.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new item:

"15. Appeals.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

SALARIES

SEC. 617. (a) AMENDMENTS TO 28 SECTION 603 OF TITLE 28, UNITED STATES CODE.—Section 603 of title 28, United States Code, is amended—

(1) by designating the existing paragraph as subsection (a) and striking out "level V" in the second sentence and inserting in lieu thereof "level IV";

(2) by adding a new subsection (b) as follows:

"(b) The Director may establish up to six positions to be paid in the same amount as the annual rate of basic pay for positions at level V of the Executive Schedule under section 5316 of title 5.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

COURT SECURITY

SEC. 618. (a) AMENDMENTS TO 28 SECTION 603 OF TITLE 28, UNITED STATES CODE.—Section 604(a) of title 28, United States Code, is amended by redesignating the existing paragraph (17) as (18) and by inserting the following new paragraph (17):

> "(17) Receive and expend, either directly or by transfer to the United States Marshals Service or other Government agency, funds appropriated for the procurement, installation, and maintenance of security equipment and protective services for the United States Courts in courtrooms and adjacent areas, including building ingress-egress control, inspection of packages, directed security patrols, and other similar activities;".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

TRAVEL REIMBURSEMENT

SEC. 619. (a) AMENDMENTS TO SECTION 604(a) OF TITLE 28, UNITED STATES CODE.—Section 604(a)(7) of title 28, United States Code, is amended by inserting a comma in lieu of the semicolon at the end thereof and adding thereafter the words, "without regard to the per diem allowances and amounts for reimbursement of actual and necessary expenses established by the Administrator of General Services under section 5702 of title 5: *Provided*, That the reimbursement of subsistence expenses may not exceed that authorized by the Director for judges of the United States under section 456 of this title;".

(b) Effective Date.—The amendments made by this section shall take effect on the date of the enactment of this Act.

REPORTS AND STATISTICS

Sec. 620. (a) Amendment to the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (12 U.S.C. 3421).—Section 1121 of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 is amended by adding the following new subsection at the end thereof:

"(b) The report required by subsection (a) of this section shall not be required after the report is submitted in the year 1989.".

(b) Amendment to Section 2412 of Title 28, United States Code.—Section 2412(d)(5) of title 28, United States Code, is amended by striking the words from "The Director" through "this title," and inserting in lieu thereof the following: "The Attorney General shall report annually to the Congress on".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

DISTRICT OF COLUMBIA PUBLIC DEFENDER AMENDMENTS

SEC. 621. (a) DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT AMENDMENT.—The District of Columbia Court Reform and Criminal Procedure Act (84 Stat. 473), is amended by—

(1) striking "by a designee of the Administrative Office of the United States Courts" in section 306(b) (D.C. Code 2-2226(b)) and inserting in lieu thereof "other designee of the Board"; and

(2) amending section 307(a) by—

(A) striking "appropriated for the judiciary to be" in the second sentence;

(B) striking "Administrative Office of the United States Courts" in the second sentence and inserting in lieu thereof, "Board of Trustees of the District of Columbia Public Defender Service"; and

(C) striking "Administrative Office" in the third sentence and inserting in lieu thereof "Board".

(b) EFFECTIVE DATE.—The amendments made by this section shall be effective on October 1, 1988.

CLAIMS COURT FEES

Sec. 622. (a) Amendment to Section 2520 of Title 28, United States Code.—Section 2520 of title 28, United States Code, is amended by striking out "$60" and inserting in lieu thereof "$120".

(b) Effective Date.—The amendment made by this section shall take effect thirty days after the date of enactment of this Act.

TEMPORARY EMERGENCY COURT OF APPEALS

Sec. 623. (a)(1) Amendments To Phase out the Temporary Emergency Court of Appeals.—Section 211 of the Economic Stabilization Act of 1970 (Public Law 91–379, as amended; 84 Stat. 799) is amended by deleting all after subsection (a) and inserting in lieu thereof the following:

"(b) Appeals taken on or after October 1, 1988 from orders or judgments entered by a district court of the United States shall be taken in accordance with the provisions of sections 1291 and 1292 of title 28, United States Code. Exclusive jurisdiction over appeals brought under this section shall be in the (United States Courts of Appeals for the respective geographical circuits) (United States Court of Appeals for the Federal Circuit).".

(2) Section 506(c) of the Natural Gas Policy Act of 1978 (Public Law 95–621; 92 Stat. 3350) is amended by striking in the first sentence the language "the Temporary

Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended," and inserting in lieu thereof "the (United States Courts of Appeals for the respective geographical circuits) (United States Court of Appeals for the Federal Circuit)"; and by striking the phrase "Temporary Emergency Court of Appeals" wherever it appears and inserting in lieu thereof, "(United States Courts of Appeals for the respective geographical circuits) (United States Court of Appeals for the Federal Circuit)".

(3) Section 1295(a) of title 28, United States Code, is amended by striking the word "and" at the end of paragraph (9) and by adding the following new paragraphs:

"(11) of an appeal under section 211 of the Economic Stabilization Act of 1970 (Public Law 91-379, as amended; 84 Stat. 799);

"(12) of an appeal under section 5 of Public Law 93-159, as amended, (87 Stat. 633 15 U.S.C. 754);

"(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978 (Public Law 95-621; 92 Stat. 3350); and

"(14) of an appeal under section 523 of Public Law 94-163, 89 Stat. 962 (42 U.S.C. 6383(b))."

(b) Effective Date.—The Temporary Emergency Court of Appeals shall be abolished effective at the close of business on September 30, 1988. All appeals pending in that court but not yet submitted to a panel on that date shall be assigned to the (appropriate court of appeals) (United States Court of Appeals for the Federal Circuit) as though they had originally been filed in that court. Any case that has been submitted to a panel of the Temporary Emergency Court of Appeals and as to which the mandate has not yet been issued shall remain with that panel for all purposes and, notwithstanding the provisions of sections 291 and 292 of title 28, United States Code, that panel shall be designated to the appropriate court of appeals United States Court of Appeals for the Federal Circuit for the purpose of deciding such case.

JUDICIAL COST-OF-LIVING INCREASES

SEC. 624. Section 140 of Public Law 97-92, 95 Stat. 1183, 1200), is hereby repealed.

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II

100TH CONGRESS
1ST SESSION

S. 1512

To provide that in judicial actions against State judges, such judges shall not be held liable for attorney fees.

IN THE SENATE OF THE UNITED STATES

JULY 21 (legislative day, JUNE 23), 1987

Mr. HATCH (for himself, Mr. THURMOND, and Mr. HEFLIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide that in judicial actions against State judges, such judges shall not be held liable for attorney fees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 722 of the Revised Statutes, known as the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. 1988) is amended by inserting before the period the following: ", except that no justice, judge, or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity".

SEC. 2. Not withstanding any other provision of law, no justice, judge, or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity.

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II

100TH CONGRESS
1ST SESSION

S. 1515

To prohibit injunctive relief, or an award of damages against a judicial officer for action taken in an official capacity.

IN THE SENATE OF THE UNITED STATES

JULY 21 (legislative day, JUNE 23), 1987

Mr. HEFLIN (for himself and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To prohibit injunctive relief, or an award of damages against a judicial officer for action taken in an official capacity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting before the period at the end thereof ", except that in any action brought against a judicial officer for an act committed in such officer's official capacity—

"(1) such officer shall not be liable for costs, including attorney's fees, unless such action was clearly in excess of his or her jurisdiction; and

"(2) injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

SEC. 2. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by adding before the period at the end of the first sentence: ", except that in any action brought against a judicial officer for an act committed in such officer's official capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

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Senator HEFLIN. Today, we have with us a distinguished group of witnesses who have explored in some depth the problems raised by *Pulliam*. Most of them speak with the voice of experience, which I find often times to be the most informative and revealing.

I look forward to the testimony today. In the interest of time, I would like to remind the witnesses to summarize their prepared statements, which will be placed in the record in their entirety.

We have a light system which will come on with a red light at the end of 5 minutes. I would appreciate it if you would summarize your testimony.

Mr. Grassley.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I commend you for holding this hearing to consider the doctrine of judicial immunity and the current erosion of this rule with respect to awards of attorneys' fees against the judiciary.

As has already been pointed out, in the 1984 case of *Pulliam* v. *Allen,* the Supreme Court, by the narrowest of margins, effectively held that judicial immunity isn't really immunity at all.

Indeed, the Supreme Court held that this centuries-old doctrine is no protection against suit for injunctive relief or the award of attorneys' fees against State court justices or magistrates.

Since *Pulliam* was decided, I have been contacted by many judges fearful of the decision's implications for judicial independence.

Their concerns, as I understand them, are based less in the threat of actual out of pocket loss than in the burdens associated with harassment litigation.

I do not believe these concerns are simply the product of exaggeration. The statistics showing the numbers of cases brought against judges also belie the suggestion that this problem is more imagined than real. *Pulliam* has spawned a substantial amount of litigation against judges, most of it meritless, by the way.

What drives these cases to be filed? The lure of attorneys' fees, the "Holy Grail" for all those lawyers in America who yearn to make a profitable career out of suing the Government.

I'm a cosponsor of both S. 1512 and S. 1515 and have supported similar bills in the past. I'm also open to persuasion on any alternative to these bills that will advance the cause of a free, fair and independent judiciary.

I look forward to the testimony and, again, compliment the chairman for his leadership in moving forward on this legislation.

STATEMENT OF HON. FLORENCE K. MURRAY, SUPREME COURT OF RHODE ISLAND

Senator HEFLIN. Judge Florence K. Murray of the Supreme Court of Rhode Island was unable to attend in person today, but did send a written statement, which will be placed in the record in its entirety.

[The prepared statement of Judge Murray follows:]

STATEMENT OF MRS. JUSTICE FLORENCE K. MURRAY

ASSOCIATE JUSTICE

RHODE ISLAND SUPREME COURT

Mr. Chairman and Members of the Subcommittee:

I am Florence K. Murray, a Justice of the Supreme Court of Rhode Island, and former Chairman of the Board of Directors of the National Judicial College in Reno, Nevada, where I served for twenty-two years as a participant, faculty advisor, faculty member and member of the Board of Directors. Prior to my elevation nine years ago to the Supreme Court of Rhode Island, I served as a trial justice and master in chancellery in the Rhode Island court system. My focus on this matter has sharpened by the fact that I was also Presiding Justice of the Rhode Island Superior Court, which administrative activity heightened my consciousness as to the every day concerns of trial judges.

My remarks are in reference to Senate Bills 1512, 1515 and 1482, presently being considered by your Subcommitee. A reading of the 3 Bills, would elicit a positive response as they do serve the needs of the judiciary. Since S-1515 addresses an immediate concern of those many judges who work in the courts on a day-to-day basis. Those concerns have been heightened by the recent U.S. Supreme Court decision in Pulliam v. Allen, 456 U.S. 522 (1984) and its implications, therefore I would urge S-1515 as a legislative priority.

The Pulliam case has been widely discussed at the National Judicial College. Trial judges, as well as decision makers in general, are disturbed that we may now be entering a period in judicial history when judicial immunity is threatened.

It is my best information that the American Bar Association supports all three Bills and has a particular preference toward immediate action on S1515. The constituency of the College and I, personally, support those representations made by the ABA at this hearing. The representations made on behalf of the ABA by my Associate, Joseph R. Weisberger, respond in detail to the judicial history which is relevant and presuasive. As you may know, the College serves a large constituency of lawyer decision makers as well as nonlawyer judicial officers. It is my considered opinion that this testimony reflects the views of this group.

May I take this opportunity, in conclusion, to thank you for your continued interest in all aspects of judicial administration, particularly your generous allotment of time to the financial concerns of the National Judicial College, its development and its continued efforts to maintain an informed and independent judiciary primarily by means of educational offerings. However, it will avail little if we have educated judges whose judgment is impaired by the threats of Pulliam v. Allen.

Senator HEFLIN. If there are others who would like to submit written statements for the record, we will hold the record open for 2 weeks after the hearing.

Our first witness is from the Department of Justice, Mr. Kevin R. Jones, Deputy Assistant Attorney General, Office of Legal Policy. Mr. Jones.

STATEMENT OF KEVIN JONES, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

Mr. JONES. Thank you, Mr. Chairman. I'm very happy to be here to speak in support of these three bills. I know it is a subject in which the chairman has taken a great personal interest.

The principal reason that the Department of Justice supports efforts to free judges from the possibility of having to pay attorneys' fees, as a result of actions brought against them for injunctive or declaratory relief, is the same reason and philosophy that underlies the entire doctrine of judicial immunity.

A free, fair and independent judiciary cannot be guaranteed except where the decisions of the judge are freed from the potential for intimidation or outside interference.

The possibility that a judge may have to answer personally for substantial monetary awards, whether they be denominated attorneys' fees or compensatory damages, cannot be considered to be anything other than a threat to judicial independence.

Justice Weisberger, who I believe will be speaking to you later today, has called the *Pulliam* decision singular and unprecedented and he predicted that *Pulliam* may well signal the twilight of judicial independence.

Similar remarks were submitted to this subcommittee in earlier years.

The Department of Justice believes that these criticisms of *Pulliam* v. *Allen* are well taken and should be given weight by Congress as it considers these bills.

The Supreme Court in its very recent decision, in *Forrester* v. *White,* on the question of the general absolute immunity of judges, made clear why judges should be absolutely immune from liability for damages for their judicial acts.

As Justice O'Connor said, the resulting timidity, if they are personally liable, would be hard to detect and to control, but it would manifestly detract from the independent and impartial adjudication by those judges.

We believe that any award of monetary damages, even if denominated as attorneys' fees would likely result in the same chilling effect upon judicial independence.

The Supreme Court's decision in *Pulliam,* of course, allows the award of attorneys' fees even where the judge could not be required to pay monetary damages, compensatory damages.

We note that the *Pulliam* decision itself is grounded entirely on the majority's view as to what was the intent of Congress in passing section 1988. The Supreme Court expressly recognized the authority of Congress either to provide for attorney fees or not to do so, as it may see fit.

Many people have questioned the analysis of the Supreme Court in *Pulliam* as to the interpretation of section 1988. The question at this point is for Congress, if it wishes to do so, to make clear its intent with respect to the liability of judges for attorneys' fees.

The three bills that are pending before the subcommittee would, in our view, return the law of judicial immunity to what it was before the passage of section 1988 as construed by *Pulliam*.

If any one of these bills is enacted, the doctrine of absolute immunity for a judge's performance of his or her official acts, a mainstay of our common-law heritage for centuries, will be properly restored.

As between the three pending bills, we tend to favor section 614 of S. 1482 as the simplest means. That would tie the liability for attorneys' fees for a judge to the common law liability for damages and the Supreme Court's recent decision in *Forrester* v. *White* does discuss the liability of judges for damages.

It would be simple because it would not define a new standard of liability. It would be tied to the existing law of immunity.

We do suggest, however, that the subcommittee may wish to broaden the provision of S. 1482 slightly to provide for similar limitations of attorneys' fees awards under other statutes besides section 1988 that might provide for attorneys' fees awards.

The other two bills, rather than tying damages to immunity for attorneys' fees, would specify that attorneys' fees may not be awarded against a judge or judicial officer for actions in an official capacity.

This would set a new, somewhat different standard, with respect to liability for attorneys' fees and liability for damages.

The Supreme Court's recent decision in *Forrester* v. *White* distinguished for purposes of absolute immunity between what it called a judicial act and what the Supreme Court called the administrative, legislative or other executive functions that judges may on occasion be assigned by law to perform.

And as to those administrative functions, according to the Supreme Court, judges do not have absolute immunity, although they may well be able to claim qualified immunity for their actions.

Thus, we believe, in light of the Supreme Court's recent decision, should the subcommittee determine to follow an approach resting on official capacity, it would be well-advised to differentiate and set forth more clearly the appropriate standard of immunity with respect to not only judicial acts, but to administrative actions that may be taken by judges.

I'd also like briefly to mention one provision in S. 1515 with respect to injunctive relief, which *Pulliam* v. *Allen* does hold to be proper against State judicial officers.

This provision of S. 1515 would limit the award of injunctive relief against a State judge in favor of declaratory relief where that is possible unless previous declaratory relief had been violated.

My written statement gives several other examples of limitations of injunctive relief and explains the reasons as a matter of comity and federalism that we think there is much to be said for the principle that intrusive injunctive relief should not be awarded against State judicial officers unless declaratory relief has been proven ineffective or was unavailable.

In conclusion, Mr. Chairman, I appreciate the opportunity to testify here today, to state the Department's position in support of the purpose of these bills. Thank you very much.

Senator **Heflin**. Without objection, the statement of Kevin R. Jones will be placed in the record in its entirety at this point.

[The prepared statement of Mr. Jones and a response to written questions follow:]

TESTIMONY OF

KEVIN R. JONES
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

Mr. Chairman and members of the Subcommittee:

I am pleased to appear before you to present the views of the Department of Justice concerning the issue of judicial immunity from liability for attorneys' fees under 42 U.S.C. § 1988 in actions seeking declaratory and injunctive relief. This issue is addressed in three pending bills: S. 1512, S. 1515, and section 614 of S. 1482.

The Department of Justice supports enactment of legislation to restore the traditional concept of judicial immunity by limiting the liability of judges for attorneys' fees. We believe that, of the possible remedies to the problem of judicial liability that exists under present law, section 614 of S. 1482 offers the simplest approach. That provision would permit the assessment of costs, including attorneys' fees, under Section 1988 against a judge or judicial officer only in those circumstances in which the judge or judicial officer can be held liable for damages relating to the same controversy. S. 1512 and S. 1515 also would limit the award of attorneys's fees against judges, but instead of tying liability for attorneys' fees to liability for damages, those bills would create a separate substantive immunity shielding judges from attorneys' fees for all or most acts taken within their "official capacity." As discussed below, that approach evidently would be broader but may create some questions of scope and interpretation.

One of the three bills, S. 1515, also addresses the related issue of whether and under what circumstances injunctive and declaratory relief should be available as against a defendant judge, an issue to which I will return at the end of my remarks with respect to attorneys' fees.

Liability for Attorneys' Fees

The principal reason that the Department of Justice supports efforts to free judges from the possibility -- as a result of actions for injunctive and declaratory relief against those judges -- of having to pay attorneys' fees to litigants who appeared before them, is the same reason and philosophy that underlies the entire doctrine of judicial immunity: a free, fair, and independent judiciary cannot be guaranteed except when the decisions of the judge are freed from all potential for intimidation or outside interference. The possibility that a judge may have to answer for substantial damages, whether they be denominated attorneys' fees or compensatory damages, cannot be considered to be anything other than a threat to judicial independence.

Under the Supreme Court's decision in Pulliam v. Allen, 466 U.S. 522 (1984), which first recognized the possibility of judicial liability for attorneys' fees, attorneys' fees may be awarded against state court judges in a case in which the judge could not be required to pay other money damages as a consequence of the suit.[1] We think the availability of attorney's fees awards in such cases has a chilling effect on the judicial independence of state judges and that principles of federalism and comity support eliminating their availability in those cases in which the judge is immune from an award of compensatory damages.

We note that Pulliam v. Allen is grounded entirely on the majority's view as to what was the intent of Congress in passing the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. See 466 U.S. at 543-44 ("it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity"). Thus, the Supreme Court has expressly recognized the authority of Congress either to provide for attorneys' fees or not to do so as it may see fit.

Although the majority of the Court in Pulliam thought that the intent of Congress on this issue was clearly expressed, four justices were unable to find any evidence of such an intent and they strongly dissented from the majority opinion. The argument for a contrary intent can also be based on the legislative history of § 1988, such as the following statement of Senator Kennedy:

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[1] Potentially, federal judges may also be liable for attorneys' fees in some circumstances under the reasoning of Pulliam v. Allen. See Weisberger, The Twilight of Judicial Independence -- Pulliam v. Allen, 19 Suffolk U.L. Rev. 537, 557-58 (1985); Zaluda, Pulliam v. Allen: Harmonizing Judicial Accountability For Civil Rights Abuses With Judicial Immunity, 34 Am. U.L. Rev. 523, 553-55 (1985).

> The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends substance to the private enforcement of rights already authorized under existing civil rights laws.
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> Furthermore, the bill will not create any new burdens for the courts. Rather, it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the [Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)] decision.

122 Cong. Rec. 31,472 (1976).

Each of the three bills now pending before this Subcommittee would serve the very valuable purpose of clarifying the law with respect to the abolition of absolute judicial immunity of state court judges. We believe that legislation should resolve this issue by returning the law of judicial immunity to what it was before the passage of Section 1988 as construed by Pulliam. If any one of these bills is enacted, the doctrine of absolute immunity for a judge's performance of his or her official acts, a mainstay of our common law heritage for several centuries, will be properly restored.

Justice Weisberger of the Supreme Court of Rhode Island has called the Pulliam decision "singular" and "unprecedented," and has predicted that Pulliam "may well signal the twilight of judicial independence."[2] We submit that such remarks are not simple hyperbole but arise instead from a serious consideration of the likely impact of allowing attorneys' fees under Section 1988 to be assessed against state court judges. These remarks also reflect the consensus of state court judges as seen in testimony given in 1985 before the Subcommittee on the Constitution of the Senate Judiciary Committee. At that time, both the Conference of Chief Justices and the Judicial Conference of the United States expressed the strong views of their members in support of restoring judicial immunity from the award of attorneys' fees.[3] Many legal scholars have also joined in this criticism.[4] The Department of Justice believes that these criticisms of the Pulliam decision and predictions as to its deleterious effect on the maintenance of an independent judiciary are well-taken and should be given great weight by Congress as it considers these bills.

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[2] Weisberger, The Twilight of Judicial Independence -- Pulliam v. Allen, 19 Suffolk U.L. Rev. 537, 554 (1985).

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[3] See Prepared Statement of Honorable Edwin Peterson and Prepared Statement of Honorable Hugh S. Dillin, Hearings on S. 1580, S. 1794, and S. 1795, Before the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate, 99th Cong., 1st Sess. 183-252 (1985).

[4] See, e.g., Noto, Pulliam v. Allen: Delineating the Immunity of Judges From Prospective Relief, 34 Cath. U.L. Rev. 829, 856 (1985) ("When state judges face the possibility that judicial acts taken within their jurisdiction might be enjoined and attorney's fees subsequently assessed against them, the threat to judicial independence is clear"); Silber, Judicial Immunity -- State Judicial Officials Are Not Immune From Prospective Relief In An Action Brought Under 42 U.S.C. § 1983 or From Paying Attorney's Fees To Prevailing Parties Pursuant To 42 U.S.C. § 1988, 14 U. Balt. L. Rev. 346, 357 (1985) ("The availability of attorney's fees awards in light of Pulliam v. Allen is likely to result in a multiplicity of suits against state judges, an anomalous result that the doctrine of judicial immunity was adopted to prevent").

The danger to an independent judiciary posed by the prospect of liability for money damages being returned against judges should not be minimized. As Justice O'Connor wrote for a unanimous Supreme Court last month in Forrester v. White, ___ U.S. ___, 56 U.S.L.W. 4067, 4068 (Jan. 12, 1988) (citations omitted):

> When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.
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> * * * * *
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> If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication.[5]

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[5] Moreover, as Justice Douglas observed in his dissenting opinion in Pierson v. Ray, 386 U.S. 547, 566 (1967):

> The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistakes, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions.

It would seem that award of any form of monetary damages (even if denominated as attorneys' fees) would likely result in the same chilling effect upon judicial independence.

As between the three pending bills which attempt to restore full judicial immunity from monetary damages, the Department's present view is that section 614 of S. 1482 is the simplest means to accomplish this legislative goal.[6] It provides that no attorneys' fees may be awarded under Section 1988 in any situation in which the judge or judicial officer "would be immune from actions for damages arising out of the same act or omission about which complaint is made." This effectively guarantees that, whenever a judge has an absolute or qualified immunity from liability for damages under 42 U.S.C. § 1983 or other statute with respect to which attorneys' fees are authorized under Section 1988, the judge will also be immune from attorneys' fees. It avoids the need to define a separate standard of immunity by tying immunity for attorneys' fees to the existing law of immunity from damages. However, because other provisions of federal law in addition to Section 1988 may authorize the award of attorneys' fees in suits that may be brought against judges, the Subcommittee might consider adding to the language of section

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[6] The Department endorsed the language of section 610 of S. 1482 in testimony last fall before the House Judiciary Committee. See Testimony of Stephen J. Markman, Assistant Attorney General, Concerning H.R. 3152, the Court Reform and Access to Justice Act of 1987, Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, United States House of Representatives, October 14, 1987.

614 of S. 1482 an additional provision (analogous to § 2 of S. 1512) which would enact a limitation on the award of attorneys' fees against judges under any other federal law.[7]

S. 1512 and S. 1515 both take a different approach than S. 1482. Instead of tying immunity from attorneys' fees to immunity from damages for the underlying action, these bills specify that no attorneys' fees may be awarded against a judge or judicial officer for actions taken in an "official capacity." This would introduce a new substantive standard for liability for attorneys' fees, apart from the existing standard for liability for damages.

Moreover, these bills use a term of art that is not defined clearly and that may well lead to difficulties in interpretation and application.[8] As the Supreme Court recently made clear in Forrester v. White, 56 U.S.L.W. at 4069, the common law absolute immunity of a judge from damages does not extend to all actions taken in his or her official capacity, but only to "judicial acts." A judge does not have absolute immunity from damages for "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform," id., although the judge may be able to claim qualified immunity for those official acts.

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[7] Such language could read as follows: "Notwithstanding any other provision of law, no costs or attorneys' fees shall be awarded against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made." This would parallel the amendment made to Section 1988 by section 610 of S. 1482 in order to preclude the award of attorneys' fees against judges under other provisions of federal law.

[8] S. 1515 also introduces the further standard of whether the judicial officer's actions were "clearly in excess of his or her jurisdiction." Presumably, this language is intended to refer to the kinds of considerations discussed by the Supreme Court in Stump v. Sparkman, 435 U.S. 349 (1978). It is not clear, however, whether that language refers to judicial acts that are within the outer reaches of jurisdiction, as discussed in Stump, or to other administrative actions that judges may be authorized to take.

We are not opposed to the approach of S. 1512 and S. 1515, but note that those bills would give rise to additional questions of scope and interpretation as described above. Accordingly, we suggest that, should the Subcommittee decide to follow this approach, it would be well advised to clarify the language "actions taken in an official capacity" to set forth more clearly the appropriate standard of immunity from attorneys' fees with respect to those administrative functions of a judge that are within the judge's official capacity but are not "judicial acts" and thus not absolutely immune from liability for damages.

Limitations on Injunctive Relief

I would also like to speak briefly on the question of the availability in a federal court of injunctive relief against a state judge. In addition to limiting attorneys' fees, S. 1515 would amend 42 U.S.C. § 1983 to provide, in an action brought against a judicial officer for actions taken in an official capacity, that injunctive relief "shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." This approach would not preclude the award of injunctive relief against state judicial officers, which Pulliam v. Allen held to be proper, but would instead adopt the prudential policy of having courts rendering decisions in cases under 42 U.S.C. § 1983 forbear from entering such intrusive relief unless and until it becomes clear that injunctive relief is needed to effectuate such judgments under Section 1983.

We are of course quite sympathetic to the concerns of federalism and judicial efficiency which have long counseled against one court's interference with the jurisdiction of another court, except through the appellate process. Nor is it unprecedented for the Congress to regulate the situations in which such extraordinary remedies are available; ready examples are the Anti-Injunction Act, 28 U.S.C. § 2283, and the Tax Injunction Act, 28 U.S.C. § 1341. The Declaratory Judgment Act, 28 U.S.C. § 2202, itself contemplates the award of declaratory relief at the outset and then, if necessary, further relief based upon the declaratory judgment after notice to the parties. We believe that there is much to be said for the principle that injunctive relief should not be awarded against state judicial officials unless declaratory relief has proven ineffective or was unavailable.

We leave for Congress the determination of whether this question can be appropriately resolved in time for inclusion as part of legislation addressing the liability of judges for attorneys' fees. The menacing chilling effect of the prospect of holding a judge liable for attorneys' fees for the exercise of a judicial function has been made clear and, in our view, should be promptly addressed as the first priority of Congress on this subject.

In conclusion, I appreciate the opportunity to testify today and to state the Department's position in support of the purpose of the pending bills to restore the absolute immunity from damages or costs (in the form of attorneys' fees) for the performance of judicial acts which is essential to maintaining an independent judiciary.

I would be happy to answer any questions.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
  Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of March 8, 1988, enclosing two questions posed by Senator Thurmond relating to the testimony by Deputy Assistant Attorney General Kevin R. Jones before the Subcommittee on Courts and Administrative Practice on February 26 with respect to legislation on judicial liability for attorneys' fees.

1. Mr. Jones, in your prepared statement you indicate that the remedy afforded in section 614 of S. 1482 "offers the simplest approach." Do you believe that section 614 of S. 1482 solves the problem we are discussing here today [of judicial liability for attorneys' fees] better than the approaches taken in S. 1512 and S. 1515?

The Department of Justice does believe that section 614 of S. 1482 offers the preferable approach to the problem presented by the current state of the law whereby a judge may be held liable for the attorneys' fees incurred by a plaintiff under 42 U.S.C. § 1983 in obtaining injunctive or declaratory relief, even though the judge would be immune from paying damages to the same plaintiff. S. 1482 would end this anomalous situation by limiting the attorneys' fees that may be awarded under 42 U.S.C. § 1988 through the following proviso: "Provided: That no such fees shall be awarded against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made."

S. 1482 thus would re-establish a congruity between a judge's liability for damages and his or her liability for costs and attorneys' fees: where the judge is properly liable for damages under § 1983, attorneys' fees may also be recovered under § 1988, but a judge who is immune from compensatory damages will also be immune from attorneys' fees. Under S. 1482, in view of a judge's traditional absolute immunity from damages (and hence for attorneys' fees) with respect to judicial acts undertaken by the judge, *see* *Forrester v. White*, ___ U.S. ___, 56 U.S.L.W. 4067 (Jan. 12, 1988), *Stump v. Sparkman*, 435 U.S. 349 (1978), a judge would only be liable for damages (and hence for attorneys' fees) for non-judicial acts taken by the judge for which no qualified immunity may apply.

This approach is not only the simplest potential solution to the problem of judicial liability for attorneys' fees, it also seems to be the most preferable one. This approach avoids the need for a separate standard for immunity with respect to attorneys' fees and avoids the potential for separate litigation over the question of liability for attorneys' fees. S. 1482 would simply borrow the existing law governing judges' liability for damages (including existing absolute and qualified immunities) and apply that law to attorneys' fees as well.

2. Mr. Jones, on page nine of your written remarks, you state that S. 1512 and S. 1515 would give rise to "additional questions of scope and interpretation." Could you please expand upon these concerns.

S. 1512 and S. 1515 do not tie liability for attorneys' fees to liability for damages, but would instead create a separate substantive standard for immunity which would shield judges from attorneys' fees for all or most acts taken within their "official capacity." This would introduce a new term of art, "official capacity," into the determination of liability of judges for attorneys' fees. The scope of this term is not specifically defined. Accordingly, these bills would necessarily lead to litigation over the meaning of the term in order to determine precisely which actions by a judge would or would not fall within the judge's "official capacity."

Moreover, it would appear very likely that "official capacity" would be interpreted to encompass more than "judicial acts." But the Supreme Court expressly has limited the scope of a judge's absolute immunity from damages to cover only "judicial acts." *See* *Forrester v. White*, *supra*, 56 U.S.L.W. at 4069 (Judges have no more than qualified immunity from damages, not absolute immunity, for "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform").

Thus, S. 1512 and S. 1515 would appear to confer a broader immunity from attorneys' fees than exists at present for damages. This disparity would not be necessary in order to preserve the independence of the judiciary freely to render its decisions, the basic rationale for judicial immunity. If a judge's conduct for non-judicial acts so departed from acceptable norms as to deprive the judge of qualified immunity and to subject the judge to liability for damages, then the imposition of attorneys' fees as well would not seem unusual. Such a disparity also would lead to litigation to determine precisely in which circumstances a judge could be held liable for damages even though the judge would be immune from an award of attorneys' fees for the same conduct. At best, it would require the litigation of two issues in these cases, one concerning liability for damages and another concerning liability for attorneys' fees.

An example may serve to illustrate this disparity. Under current law, a state judge might be sued for violating the civil rights of another as a result of an administrative decision, such as the hiring or discharging of office personnel. In such a suit, the judge would enjoy only a qualified immunity, because the complaint does not arise from the judge's performance of a judicial act, and the judge potentially could be held liable for compensatory damages if the necessary predicates for qualified immunity cannot be established. Under the present text of § 1988, and under Section 614 of S. 1482, if liability for damages were established, the judge would also be liable for attorneys' fees incurred by the prevailing plaintiff in bringing the action. However, both S. 1512 and S. 1515 would amend § 1988 to immunize the judge from payment of attorneys' fees for all or almost all actions taken in his or her "official capacity." Almost certainly, the act of hiring or discharging judicial personnel would be an act taken in the judge's official capacity and, accordingly, the judge would be immune from the payment of attorneys' fees, even though liable for damages.

In concluding that judges who make non-adjudicative decisions with respect to the hiring and firing of employees are not entitled to absolute immunity from damages, the Supreme Court in *Forrester v. White*, 56 U.S.L.W. at 4070, stated its belief that in this respect judges are like district attorneys and other public officials who make similar employment decisions. While the absence of absolute immunity in this respect may serve to inhibit the judge's discretion, the Court concluded that it would not have an impact on judicial independence with respect to adjudicatory decision-making.

Thus, under *Forrester*, judges already are aware that they can be held liable for damages relating to the performance of non-judicial acts, if they cannot meet the requirements for qualified immunity. This awareness already serves to guide a judge's conduct in performing such acts. The knowledge that a judge might be immune from attorneys' fees even if a damage suit could be successfully brought can hardly be imagined to have any great effect one way or another. It would not seem to provide any substantial comfort to a judge who felt threatened by the possibility of having to pay compensatory damages in a contested employment matter to know that attorneys' fees could not also be recovered.

In any event, should the Subcommittee decide to follow the approach taken in S. 1512 or S. 1515, we respectfully suggest that it would be well advised to clarify the language "actions taken in an official capacity" to set forth more clearly the kinds of non-judicial acts by a judge, if any, which would be immunized absolutely from liability for attorneys' fees even though liability for damages could still attach.

Sincerely,

Tom Boyd

Thomas M. Boyd
Acting Assistant Attorney General

Senator HEFLIN. Judge Danielson and Justice Peterson suggest that we should further amend the proposed legislation to require that State remedies be exhausted before the Federal courts can step in and issue an injunction. What are your thoughts on this?

Mr. JONES. Senator, that goes to the question, I guess, of jurisdiction for actions under section 1983. There has been a very substantial amount of dispute over the years with respect to the Supreme Court's decisions which have held that exhaustion of administrative remedies is not required under section 1983 as a matter of congressional intent.

The Department of Justice has supported a position in the past in favor of consideration of exhaustion requirements as is required in almost all other contexts including, for example, habeas corpus actions brought in the Federal courts. State remedies must be exhausted before habeas may be sought.

That is something of a different question as to the one that we're considering here today with respect to attorneys' fees. We believe it's one that merits substantial consideration.

Senator HEFLIN. Thank you, sir.

Next is a panel consisting of Judge George E. Danielson, Associate Justice, California Court of Appeals, who represents the Judicial Conference of the United States; Justice Edwin J. Peterson, the Chief Justice of the Supreme Court of Oregon; and Judge Ira Raab, the Chair of the Legislative Committee of the American Judges Association.

Judge Danielson, we will start with you.

PANEL CONSISTING OF HON. GEORGE E. DANIELSON, ASSOCIATE JUSTICE OF THE CALIFORNIA COURT OF APPEALS, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES; HON. EDWIN J. PETERSON, CHIEF JUSTICE, SUPREME COURT OF OREGON, ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES; AND HON. IRA RAAB, CHAIR, LEGISLATIVE COMMITTEE, ON BEHALF OF THE AMERICAN JUDGES ASSOCIATION

STATEMENT OF GEORGE E. DANIELSON

Judge DANIELSON. Thank you, Mr. Chairman. I thank you for the opportunity to appear before this committee and I want to commend the committee for taking up—giving hearings to this very important subject.

I understand that my written statement will be received in the record. I really cannot state much of anything that I haven't placed in that statement.

But, in sum, since the decision in *Pulliam,* which held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity and that judicial immunity is not a bar to the award of attorneys' fees under title 42, section 1988, this subject has been of increasing and very great concern to State judges everywhere.

As the chairman pointed out at the beginning of this hearing, the purpose of judicial immunity is not to give some special favor to judges anywhere. It's to protect the judicial process.

After all, the function of the judicial process is to render the very best and most effective, most full judgment possible on the cases and controversies that come before the judges, before the courts.

Now, that function is a tremendously heavy one. A very responsible one, as the chairman knows. And it should not be impaired in any respect by fear or favor. It should not be impaired by harassment or vexation.

Therefore, there is a very necessary reason for judicial immunity. Members of the elective body, the parliamentary body of the U.S. Government, know full well that there is constantly pressure from one's constituents as to how votes should be cast on this, that or the other matter.

It is not as acute on the bench, but, nevertheless, I think all of us who have served on State benches, and I think probably on Federal benches, know that public opinion and the manifestations of public opinion are real forces, which tend to impact upon the minds of the judges and sometimes the juries involved in judicial proceedings.

It's not unusual today to hear of a demonstration before a courthouse in favor of or against something that's pending therein.

In the absence of judicial immunity, a judge who is called upon to make a decision on what may be a highly unpopular cause has some compunction about going out too far, of being so far in the lead that he's lost all of his support.

I do not mean to say by that that judges do not attempt consciously, always, to give their very best judgment, their very best opinion, but the subtle effect of outside pressure, of fear, of favor, of harassment, of vexation is such that it can have an impact on the judicial process. And to the extent it does, we are the poorer for it.

Our judicial system depends upon the fairest and fullest of decisions by judges.

Now, it's interesting that in many respects the public accepts this position. For example, I come from a State court. We are appointed, usually. Theoretically you can be elected. But periodically you come up for reelection.

There are many conscientious, sincere citizens who say that that pressure for reelection should be removed. There should be a lifetime appointment such as we have on the Federal courts. So, there would absolutely no concern in a judge's mind as to whether it be wise to rule one way or another. And no matter how consciously he tries to achieve that end, there could be subliminal underlying factors that might dull the efficiency of his opinion. So, I feel that immunity is critically important.

Now, I was a Member of the Congress in 1976. I was a member of the subcommittee in the House and the committee in the House which passed the law which became 42-1988.

I share some of the credit for that fine piece of legislation, but I also share some of the blame.

I do not recall any discussion in our subcommittee as to whether or not the imposition of attorneys' fees and cost would be awarded against a judge.

We sort of—at least I sort of thought of a judge as a referee in a contest, the person who adjudicates a decision between others, but not a party to the controversy himself.

I've been on the bench now for approximately 6 years and I know the importance of judicial immunity. I know that judges have a fear that they may be held liable for a judgment, be it for costs and attorneys' fees or damages, which is sometimes a very large dollar sum.

As a matter of fact, within the last couple of months, the insurance industry has picked up on this fear and now we are being circularized and solicited to take out insurance for judicial indemnity and defense.

The basic policy premium in California is $850 a year for some type of coverage.

Now, Mr. Chairman, I would like to point out that we cannot—if a judge has to be faced with the possibility of a judgment, be it for attorneys' fees and costs or damages, this is a factor that must remain in his mind.

He knows it lies there. I know that my associate here, Justice Peterson, has had some personal experience.

But the way I look at it—I would like to borrow from the language of former Justice Otto Kaus of the California Supreme Court who said, "It's like having an alligator in your bathtub. You can't ignore it." So long as it's there you must be cautious not to raise its wrath. And if you do, you have to be very careful that he can't vent that wrath upon you. And I feel the same way about a money judgment.

Thank you, Mr. Chairman.

Senator HEFLIN. Without objection, the statement of Judge George E. Danielson will be placed in the record in its entirety at this point.

[The prepared statement of Judge Danielson follows:]

PREPARED STATEMENT
OF
GEORGE E. DANIELSON

MEMBER, COMMITTEE ON FEDERAL-STATE RELATIONS
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES,

MEMBER, THE COMMITTEE ON JUDICIAL IMMUNITY
OF THE
CALIFORNIA JUDGES ASSOCIATION

SUMMARY

The continued existence, and scope of judicial immunity is of great concern to all state court judges. Historically judges have been absolutely immune from suits for damages based on their judicial acts.

The objectives of the doctrine are to protect judicial decisionmaking from intimidation and outside interference and to protect judges from harassing and vexatious litigation resulting from their judicial acts.

The federal civil rights statute (42 U.S.C. § 1983) authorizes federal courts to enjoin state court action violative of § 1983. The Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988) authorizes awards of attorney's fees to prevailing parties in actions brought to enforce § 1983.

Pulliam v. Allen holds that state court judges may be prospectively enjoined from violating § 1983, and attorney's fees and costs may be awarded against them. It holds that judicial immunity bars neither of these results.

There is urgent need for legislation to restore judicial immunity from money judgments for attorney's fees and costs, and to reduce the volume of litigation resulting from Pulliam v. Allen.

A legislative remedy proposed by the Judicial Conference of the United States is set forth in § 614 of the bill S. 1482. An additional legislative proposal is set forth, to bar injunctive relief against state court judges where a plain, speedy and efficient remedy may be had in the courts of the state.

My name is George E. Danielson. I am an Associate Justice of the California Court of Appeal, a member of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States, and a member of the Committee on Judicial Immunity of the California Judges Association.

First of all, I wish to thank you for the opportunity to appear before you to express my views on the subject of judicial immunity, and to commend you for holding hearings and giving consideration to this important subject. In my opinion, concern over the continued existence, and the scope, of judicial immunity, is shared by all state court judges, and many, if not all, federal judges throughout our land. It is a matter uppermost in the minds of judges everywhere.

Historically and traditionally judges have been absolutely immune from civil suits for damages based upon their judicial acts committed within their jurisdiction. For these purposes, the element of jurisdiction is satisfied if the "judicial act" is a function normally performed by a judge and the parties were dealing with the judge in his judicial capacity. (Stump v. Sparkman (1978) 435 U.S. 349, 361-362 [55 L.Ed.2d at 342].)

The doctrine of judicial immunity has its roots in the common law. Its primary objective is to protect judicial decisionmaking from intimidation and outside interference and to protect judges from harassing and vexatious litigation based upon their judicial acts. Inasmuch as the doctrine gave judges absolute immunity from civil actions for damages the burdens of litigation, rather than the threat of pecuniary loss, was cited as the threat to judicial independence.

In 1972 the Supreme Court ruled that the federal civil rights statute (42 U.S.C. § 1983), which authorized suits in equity to redress the deprivation, under color of state laws, of federal constitutional rights, privileges, or immunities, was an "expressly authorized" exception to the federal anti-injunction statute (28 U.S.C. § 2283), and therefore federal courts could grant an injunction to stay state court proceedings violative of § 1983. (Mitchum v. Foster (1972) 407 U.S. 225 [32 L.Ed.2d 705].) In 1976 the Congress enacted The Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), which provides that in any action or proceeding to enforce a provision of (inter alia) section 1983 the court may, in its discretion, allow the prevailing party a reasonable attorney's fee as part of the costs.

In May of 1984 the Supreme Court, by a 5 to 4 vote, held that while judges are immune from a judgment for damages, judicial immunity does not bar the award of attorney's fees against State court judges in a case in which the plaintiff prevails in a suit against such judge for injunctive or declaratory relief pursuant to 42 U.S.C. § 1983. (Pulliam v. Allen (1984) 466 U.S. 522.)

As we all are aware, the subject of judicial immunity was brought into sharp focus by the opinion of the Supreme Court in Pulliam v. Allen. In that case the court examined the scope of judicial immunity from a civil suit that sought injunctive and declaratory relief under the Civil Rights Act, 42 U.S.C. § 1983, and an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

In Pulliam, plaintiffs were arrested for nonjailable misdemeanors. Defendant, a Virginia county Magistrate, imposed bail, and when plaintiffs were unable to meet the bail the Magistrate committed them to jail. Plaintiffs were tried, found guilty, fined, and released. Subsequently plaintiffs brought an action against the Magistrate in the U. S. District Court under 42 U.S.C. § 1983, claiming that the defendant's practice of imposing bail in such cases, and incarcerating those who could not meet the bail, was unconstitutional. The District Court agreed and enjoined the practice, and also awarded plaintiffs their costs and attorney's fees under 42 U.S.C. § 1988. The Court of Appeals determined that judicial immunity did not extend to injunctive relief under § 1983 and that prospective injunctive relief properly had been awarded against the defendant Magistrate, and affirmed the award of attorney's fees and costs. The defendant Magistrate did not appeal from the award of injunctive relief against her.

In affirming the judgment of the Court of Appeals the Supreme Court held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity" (id. at pp. 541-542) and that "Judicial immunity is no bar to the award of attorney's fees under 42 U.S.C.§ 1988." (Id. at p. 544).

The decision in Pulliam has caused great concern among state court judges. They feel that their resulting exposure to harassing and vexatious litigation, intimidation, and outside interference, together with money judgments for attorney's fees and costs, because of an erroneous judicial decision on their part, are threats to the independent judicial decisionmaking which is an indispensable part of the judicial process and to the financial security of themselves and their families.

The dissenting opinion in Pulliam, written by Justice Powell, with whom Chief Justice Burger, Justice Rehnquist and Justice O'Connor joined, sets forth the principal reasons for concern about the effect of that decision on the judicial process. The dissent points out why, and in what respects, legislation is needed in order to assure the degree of judicial immunity which is essential for independent judicial decisionmaking.

The dissent first points out that the Supreme Court has consistently held, since 1869, that judges are absolutely immune from suits for damages, and that the Pulliam decision reaffirms that rule; yet Pulliam holds that judges may be sued for injunctive and declaratory relief and held personally liable for money judgments in the form of costs and attorney's fees merely on the basis of erroneous judicial decisions. The dissent observes that "Such a judgment poses the same threat to independent judicial decisionmaking whether it be labeled 'damages' . . . or 'attorney's fees '. . . ." (Id. at pp. 544-545.)

The majority in Pulliam conceded that there was logic to petitioner's reasoning that judicial immunity should bar a fee award because attorney's fees are the functional equivalent of monetary damages, which indisputably are prohibited by judicial immunity, and that the chilling effect of a damages award is no less chilling when the award is denominated attorney's fees. It was held, however, that it was for the Congress and not the Court to determine whether and to what extent to abrogate the judiciary's common-law immunity, and that in § 1988 Congress had eliminated such immunity as to attorney's fees.

In the Pulliam case the award against the Magistrate for attorney's fees and costs, because of an erroneous judicial decision, was $7,691.09, of which $7,038 was for attorney's fees.

With respect to the concern directed at the punitive effect of assessment of attorney fees under 42 U.S.C. § 1988, the initial fears are proving wellfounded. In the first instance, I understand that the relatively modest attorney fees award of $7,038 in the Pulliam case mushroomed to a request for an additional $88,000 following the decision by the Supreme Court. The claim was ultimately settled for $36,000. Attorney fees were also awarded against the Supreme Court of Virginia for litigation over the constitutionality of the promulgation and enforcement of a rule prohibiting attorney advertising. (Consumer Union of the United States, Inc. v. American Bar Association (E.D. Va. 1981) 505 F.Supp. 822, aff'd in relevant part, 688 F.2d 218 (4th Cir. 1982), cert. denied, 462 U.S. 1137, [103 S.Ct.

3124] (1983) (Burger, C.J., Rehnquist, J., dissenting).) The Supreme Court of Virginia ultimately settled for $98,000 for attorney fees in the case. Attorney fees of some $35,000 have been awarded by the United States District Court for the District of Oregon against Chief Justice Edwin J. Peterson of the Oregon Supreme Court, and others, in a case in which the District Court enjoined recoupment of attorney fees from acquitted indigent defendants as provided in the Oregon recoupment statute. (Finch v. Belshaw (PA., D. Ore., 1984) Civ. No. 83-991.) In Morrison v. Ayook (3rd Cir. 1984) 727 F.2d 1100, a case from the Western District of Pennsylvania, fees for the substantive case plus subsequent fee litigation amounted to $24,211.20. The original case--ultimately dismissed as moot because defendants had altered their mode of operation--challenged the practice of sending convicted indigents to jail for petty offenses without affording right to counsel.

The attorney fees awarded in these cases were ultimately paid by a governmental unit and not the judge in his or her individual capacity. The fact remains that each case that joins a judge as an individual places an open ended financial threat against the judge for making honest judicial decisions for which a governmental unit may not be liable (see Kentucky v. Graham (1985) 473 U.S. 159 [105 S.Ct. 3099] which held that fees could not be recovered from a governmental entity when government employees are sued in their personal capacities). Indeed, the State of Virginia was not legally bound to pay the fees assessed in Pulliam. The Judicial Conference has concluded that to place such a burden on a judge or judicial officer acting in a judicial capacity is an unsound and counterproductive policy.

Clearly, exposure to such fee and costs awards. resulting from the possibility of making an erroneous judicial decision, has a chilling effect upon a judge's independent decisionmaking.

The dissenting opinion in Pulliam noted that since the enactment of the attorney's fees provisions of § 1988 in 1976, suits against state officials under § 1983 "have increased geometrically" and that the awards have increased with the precipitous increase in hourly rates. It characterized the attorney's fee provision as "a major additional source of litigation." (Id. at p. 555.)

Each of the three bills before this committee at this hearing addresses the concerns which I have expressed, in one manner or other.

Section 614 of the bill S. 1482 states the proposal of the Judicial Conference of the United States on the subject of judicial immunity; it would amend 42 U.S.C. § 1988 by striking the period of the end thereof and inserting at the end the following language: "Provided: That no such fees shall be awarded against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made." On behalf of the Conference that is the position which I support today.

The theory of this proposed amendment is that just as judges are immune from civil actions for damages for their judicial acts or omissions, they would also be immune from awards of attorney's fees and costs in actions or proceedings arising out of the same acts or omissions. This amendment would bring relief from the threat of such money judgments as I have referred to above.

The other two bills now before the committee suggest other approaches to the problem. While those approaches may be broader than that set forth in S. 1482, the Judicial Conference does not object to them.

Expressing my own views, as a member of the Committee on Judicial Immunity of the California Judges Association, I would suggest an additional amendment. While the above amendment would remove the threat of money judgments against judges for acts or omissions committed in their judicial capacity, it would not eliminate the threat of burdensome and harassing litigation seeking injunctions or other redress against their judicial acts. I suggest that there be an additional amendment to provide that injunctive or declaratory relief shall not be granted against a state judge or judicial officer where a plain, speedy and efficient remedy may be had in the courts of such state. I do not quibble about the precise language which should be used in setting forth that objective. The wording which I have suggested is that used in two of the specific-purpose anti-injunction statutes found in the United States Code: 28 U.S.C. §§ 1341, and 1342, sub. (4).

In connection with this latter proposal I wish to point out that the court's opinion in Pulliam observed that "For the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards. The limitations already imposed by the requirements for obtaining equitable relief against any defendant--a showing of an inadequate remedy at law and of a serious risk of irreparable harm [citation], severely curtail the risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants." (Id. at pp. 537-538.) "[W]e express no opinion as to the propriety of the injunctive relief awarded in this case. Petitioner did not appeal the award of injunctive relief against her. The Court of Appeals therefore had no opportunity to consider whether respondents had an adequate remedy at law, rendering equitable relief inappropriate, or whether the order itself should have been more narrowly tailored." (Id. at pp. 542-543.)

Thank you. I will be glad to answer any questions.

Senator HEFLIN. We are delighted to have Justice Peterson of the Supreme Court of Oregon and to hear from you now, sir.

STATEMENT OF HON. EDWIN J. PETERSON

Justice PETERSON. Mr. Chairman, I, too, thank you for the opportunity of being here today.

I'd like to start my comments by making reference to a couple of actual experiences to make the point that I will try to make later in my presentation.

Sometime before 1983, a criminal defendant was charged with a crime and acquitted. Pursuant to a statute that the Oregon Legislature passed, he was imposed with the cost of the attorneys' fees that were provided him by the State as an indigent defendant.

His lawyer claimed that that was unconstitutional and filed a lawsuit in the Federal court against my predecessor to enjoin the enforcement of that statute.

When I became chief justice in 1983, I was substituted as the defendant in that case. Ultimately, the Federal court in Oregon ruled that the statute was unconstitutional, entered an injunction against me, not the trial judge, and imposed attorneys' fees against me of $35,000.

Once that decision was made, I had to consider how that affected me in a host of other areas. And I can say honestly and candidly that thereafter, in those other areas, for example, diverted defendants and a whole other host of other defendants who might arguably be the same as "acquitted defendants," in every case, I ruled—where there was a question, I ruled in favor of the defendant in exercising my administrative responsibilities.

I can tell you with all sincerity that my independence had been substantially fettered.

In January of this year the court of appeals in Oregon awarded attorneys' fees to a lawyer for an indigent of *x* dollars.

This lawyer claimed that her constitutional rights under section 1983 had been violated and she filed a lawsuit in the U.S. district court naming me as a defendant.

Shortly after that case was filed, one of the other judges on the court of appeals went to the chief judge of the court of appeals and said, "I cannot sit on any cases involving this lawyer because of the fear that if I do, I too, will be joined as a defendant."

It's just the threat of being sued, the threat, to say nothing of the threat of attorneys' fees—does substantially impair the exercise of independence by judges.

That is a very substantial threat as is evidenced by the fact that all these judges are here today.

Justice O'Connor, in a case decided last month, *Forrester* v. *White*, said:

> When officials are threatened for personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.

I suggest to you and the other members of this body that an important question for you to consider in considering this proposed legislation is this: If this legislation is passed, what will the effect be on section 1983 plaintiffs? Will it substantially fetter their assertion of their rights?

According to the ACLU submission, and I'm quoting, "On many issues the highest State courts of the land are more protective of civil liberties than is the Supreme Court." I don't think that there can be any disagreement with that.

Both the ACLU and the NAACP state that instances of injunctive relief and attorneys' fees awards against judges are rare.

That is true, they are rare. But the threat to judicial independence in not rare. The threat is real and keenly felt by all judges, State and Federal.

If the instances of need are rare and the interference with judicial independence is present and real, how should the balance be struck?

I respectfully and with as much force as I can bring to this body suggest that the balance tips in favor of judicial immunity.

I also represent to my friends from the ACLU and the NAACP and all other possible 1983 plaintiffs that the existence of judicial independence is more important to the protection and enforcement of civil rights than is the right to recover attorneys' fees against judges in cases where they are doing that which their oath requires them to do, to interpret the law.

In closing, may I say that most of the cases in which attorneys' fees have been imposed against judges involved situations in which the judge was following the law as the legislature passed it.

I have no quarrel with the rule that judges should be liable for acting outside of their jurisdiction, both for damages and for injunctive relief.

The *Pulliam* majority, itself, Mr. Chairman, concluded its opinion by inviting Congress to look into this.

The majority said, "It is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common law immunity."

I assure you, Mr. Chairman, that the judges in this room are not here because of some illusory threat to the system in which we serve.

Our response to the *Pulliam* decision has been immediate, it has been substantial and I submit it is important. Thank you, again, for permitting me to appear.

Senator HEFLIN. Without objection, the statement of Justice Edwin J. Peterson will be placed in the record in its entirety at this point.

[The prepared statement of Justice Peterson and responses to written questions of Senators Grassley and Thurmond follow:]

STATEMENT OF

THE CONFERENCE OF CHIEF JUSTICES

BEFORE THE

SENATE JUDICIARY SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

ON

THE DOCTRINE OF JUDICIAL IMMUNITY

S. 1482, S. 1512, and S. 1515

FEBRUARY 26, 1988

Mr. Chairman and Members of the Subcommittee. The Conference of Chief Justices appreciates this opportunity to express its support for legislation that would restore and protect the ancient doctrine of judicial immunity that is the bedrock of the Anglo-American system of justice. I am Edwin J. Peterson, Chief Justice of the Supreme Court of Oregon and chairman of the Conference's Committee on Judicial Immunity/Pulliam v. Allen. I have been asked to appear by the President of the Conference, Chief Justice Clement C. Torbert, Jr. of the Supreme Court of Alabama.

We are greatly in you debt, Mr. Chairman, for the forum this hearing provides for discussion of the critical problems posed for the immunity doctrine, and our system of federalism, when federal judges impose attorney fee awards and prospective injunctive relief on judges in the state court systems.

At the threshold, it is important to separate what we seek from what we do not seek. Under the Supreme Court's decision in Pulliam v. Allen[1] state judges now can be enjoined from acts subsequently found to impinge on federal constitutional rights and attorney fees now can be recovered from judges incident to such injunctive relief. We are not here to seek modification of anyone's rights. But we do seek immunity from the award of attorney fees and the opportunity to resolve any question of constitutional rights in the state courts before a federal court can intervene.

As you may recall, we first informed the Congress of our concerns about these issues shortly after Pulliam was handed down by a sharply divided (5-4) Supreme Court on May 14, 1984. At that time we said of the decision: "No development in recent times has aroused greater concern on the part of state judges". If anything, that concern is greater today.

First, a brief summary of of the case. Gladys Pulliam, a magistrate in Culpeper County, Virginia, had apparently set bail for Richmond Allen and Jessie Nicholson for certain offenses which were nonjailable under Virginia law. This resulted in both Allen and Nicholson being incarcerated for a period of time for failure to make bond, although they were charged with offenses for which the maximum penalty in Allen's case was a $500 fine and in Nicholson's, a $100 fine. After their cases were disposed of, Allen and Nicholson became plaintiffs in an action pursuant to 42 U.S.C. 1983 against Magistrate Pulliam. A judge of the District Court for the Eastern District of Virginia found that Margistrate Pulliam made it her practice to require bond for nonincarcerable offenses, found the practice to be unconstitutional on due process and equal protection grounds, and enjoined her from further actions of a similar nature.

In addition to the injunctive relief, the District Court awarded $7,691.09 to the plaintiffs as costs including a counsel fee of $7,038. Magistrate Pulliam, claiming judicial immunity, appealed only from the award of counsel fees. The Court of Appeals for the Fourth Circuit determined that the magistrate was not immune from an award of counsel fees, nor was she immune from prospective injunctive relief. The Supreme Court affirmed, expressly holding that the venerable common law doctrine of absolute judicial immunity is not a bar to injunctive relief in federal civil rights (42 USC 1983)[2] actions against a member of the state judiciary acting in a judicial capacity, or to the award of attorney fees against the judge under 42 USC 1988[3].

Nothing has occurred since Pulliam came down to lessen our concerns. On the contrary, data from surveys completed for us by the National Center for State Courts indicate that our fears were and continue to be well founded and that state judges face increasing exposure to fee awards in cases challenging their judicial as well as other official decisions.

We are here today because we firmly believe, as did the four dissenting justices in Pulliam, that the decision seriously breaches the doctrine of absolute judicial immunity and therefore threatens the independence that is at the heart of the judicial function. State judges cannot act effectively if their decisions, even when reasonably and conscientiously made in keeping with state law, are subject to immediate challenge in the federal courts and the legal costs that involves. This central point was made by Justice Powell, speaking for the minority in Pulliam:

> "The Court affirms a $7,691 money judgment awarded against a state magistrate on the determination that she made erroneous judicial decisions with respect to bail and pretrial detentions. Such a judgment poses the same threat to independent judicial decisionmaking whether it be labeled 'damages' of $7,691 or 'attorney's fees' in that amount ... The burdens of having to defend such a suit are identical in character and degree, whether the suit be for damages or prospective relief. The holding of the Court today subordinates realities to labels. The rationale of the common-law immunity cases refutes the distinction (between fees and damages) drawn by the Court."

The majority agreed that "there is, perhaps, some logic" to the argument that "the chilling effect of a damages award is no less chilling when the award is denominated attorneys's fees." But they went on to say "that it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity." Only Congress can mend this breach in the ancient doctrine of judicial immunity.

Before proceeding with a discussion of the remedy we now think necessary I should again note that we are not seeking to bar anyone's right to a judicial forum for complaints alleging unconstitutional actions by state judges. Our concerns are over the procedures for such review sanctioned by the Supreme Court because of the peculiar manner in which the issues were presented to it in Pulliam. In the first instance we do not believe there was need for injunctive relief in Pulliam because adequate remedies were available, as the minority noted, under Virginia law. But this issue did not come directly before the court because Magistrate Pulliam did not appeal the injunction, but only the subsequent fee award, limiting her defense to the doctrine of judicial immunity. However, in order to get to the fee issue, the Court had to rule first on the propriety of the injunctive relief.

We are of course concerned with that portion of Pulliam which held that Congress, by failing to grant a specific exemption for judges in the Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USC 1988), intended that judges be liable for fee awards and accordingly intended to curtail their common law immunity to that extent. But we also are concerned with the very serious issues of comity, federalism, and the orderly administration of justice that arise when federal courts intervene in state court proceedings on issues that can readily be resolved by the state courts themselves. In short, we do not believe there is need for a federal judge to enjoin a state judge in a federal civil rights action absent a showing of an inadequate remedy at law within the state court system and a serious risk of irreparable harm, the criteria normally applied to requests for equitable relief.

We believe that Pulliam -- both the Court's opinion and the dissent -- supports this view. The Court discussed but did not decide the propriety of the injunctive relief granted against Magistrate Pulliam because, as the Court noted, she did not appeal the injunction itself but limited her appeal to the subsequent fee award. With the issues framed in this form the Court found, reluctantly we believe, that judicial immunity itself, the only defense raised, was not a bar to prospective injunctive relief. But the Court went on to make it clear that:

> "In so concluding, we express no opinion as to the propriety of the injunctive relief awarded in this case. Petitioner did not appeal the award of injunctive relief against her. The Court of Appeals therefore had no opportunity to consider whether respondents had an adequate remedy at law, rendering equitable relief inappropriate, or whether the order itself should have been more narrowly tailored. On the record before us and without the benefit of the Court of Appeals' assessment, we are unwilling to speculate about these possibilities." (emphasis added)

Thus, the Court appeared to say that had Magistrate Pulliam appealed the injunction itself and shown an adequate remedy at law within the state system, it might well have decided differently.

Accordingly, the Conference of Chief Justices supports the approach taken by S. 1515 which would not only bar fee awards against judges but would bar injunctive relief. But we would prefer language requiring exhaustion of state remedies in place of S. 1515's provisions on declaratory relief because we see little difference between declaratory and injunctive relief if federal intervention is unnecessary and inappropriate to begin with.

Thus, we believe Congress should not only bar fee awards against judges under 42 U.S.C. 1988 but should bar any federal intervention, declaratory or injunctive, if a remedy is available under state law and there is no serious risk of irreparable harm.

Tentatively, we would propose to do this by amending S. 1512 along the lines of the draft legislation attached to this statement as Appendix A.

You will recall that the Attorney's Fees Act was passed by Congress in response to the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society[4]. In that decision the Court held that federal courts, which had been awarding fees to prevailing plaintiffs under their equity powers, could no longer do so absent specific authority from Congress. Because such statutory authority was lacking in the Reconstruction Civil Rights Acts, including 42 USC 1983, Congress moved quickly to fill the gap. A bill was signed into law on October 11, 1976, only 17 months after the opinion came down. The Senate Judiciary Committee, indeed, reported the bill without hearings, relying on earlier hearings on legal fees conducted by the Subcommittee on Representation of Citizen Interest in 1973.[5]

We might not be here today if this body, when processing the Attorney's Fees bill, had been made aware of the judicial interests at stake Unfortunately, state judiciaries were not represented in Washington at that time and did not review or take a position on the bill. There was little if any participation by state and local officials, executive, legislative, or judicial. Certainly there was no serious discussion of the doctrines of absolute legislative and judicial immunity as distinct from the limited immunity doctrines applicable to officials of the executive branch. While Congress did not specifically exclude judges from the Act it did not show a specific intent to include them either. As best we can determine, the issue simply was not discussed. There is no specific comment in the Senate report; certainly no reference to any intent to limit judicial immunity or to create a new right to fees against judges. Instead, the report made it clear that:

> "This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys'

> fees which had been going on for years prior to the Court's (Alyeska) decision."[6]

The House report limited its comments to two sentences, citing a particular need for counsel fees where "immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." A footnote to this comment cited three Supreme Court decisions discussing qualified immunities. Only one of these, Pierson v. Ray,[7] involved a judicial officer, who was held immune from damages in an opinion by Chief Justice Earl Warren that included powerful statements in support of the doctrine of absolute judicial immunity. Because legal fees against the judge were not at issue, and because the case also involved police officers who were found to have a qualified immunity, the House report, in context, should be read as citing a need for legal fees in cases against executive officials protected by limited "good faith" immunity. Therefore, we must conclude that Congress's failure to specify one intent or the other on judicial immunity was meant to ratify prevailing practice that did not include fee awards against the judiciary in cases involving injunctive relief.

We have not been able to locate the Senate hearings[8] from 1973 but it appears from the House hearings,[9] held in October and December of 1975, that we are correct in concluding that the doctrine of judicial immunity was not at issue. Sponsors of the bill made it clear at all stages of the legislative process that the only intent was to restore the status quo ante by providing the statutory authority for fee awards required by Alyeska. The principal Senate sponsor of the legislation, John V. Tunney, said:

> "The purpose of this bill is simple — it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes ... It therefore restores to the federal courts authority which they had exercised for years until a little over 2 months ago."[10]

Similarly, Robert W. Kastenmeier, chairman of the House subcommittee with original jurisdiction over the bill, said:

> "This is a first step and a rather limited and cautious one. It does not overturn law or practice, except the Alyeska case ..."[11]

He went on to say, in tacit recognition of the hasty manner in which the legislation was considered, that the issue of fee shifting "needs much further analysis than this session would allow." It is our hope, then, that this Congress will give the doctrine of judicial immunity the attention it deserves and amend 42 USC 1988 to restore it to its historic form and assure its preservation.

* We do not intend to burden this hearing with an extended discusson of judicial immunity. The corpus of case law and scholarly literature on the subject is immense and we would be pleased to provide recent studies, including discussions of the Pulliam decision, for the hearing record.[12] We take it for granted that there is no serious disagreement with the proposition that judicial immunity is essential to the Anglo-American system of justice. The United States Supreme Court, including the Pulliam court, has never wavered in its support for the doctrine as it involves direct damages against a judge for judicial decisions made in the exercise of proper jurisdiction. This was true even where commission of a tort was alleged to be corrupt or malicious.[13] It was true, that is, until the Pulliam court, relying on 42 USC 1988 as amended in 1976, permitted a fee award which it agreed could have the same "chilling effect" as an award of damages.

That a "chill" has gone through the ranks of state judges is beyond dispute. The reaction to Pulliam was powerful and immediate, involving individual judges and judicial and bar organizations at the local, state, and national levels. The Conference of Chief Justices, acting at its first meeting after the decision came down, expressed its alarm by passing resolutions (1) calling on Congress to restore the judiciary's common law immunity by amendment of 42 U.S.C. 1988, (2) urging the Judicial Conference of the United States to study the issue and support corrective legislation, and (3) creating a Task

Force of the Conference of Chief Justices to study and report back to the Conference on the extent of the problems raised by the decision.[14] We are particularly pleased that the Judicial Conference, the American Bar Association and its Section of Judicial Administration, as well as many state judicial councils and bar associations have joined in the call for a legislative response. This means that the top policymaking officials of those most directly involved, including the state and federal judiciaries and the legal profession, see a threat to judicial immunity that requires action by Congress.

As I have indicated, this threat is confirmed by studies conducted for the Conference of Chief Justices by the National Center for State Courts. The first of these shows that the treat is real and widespread and that it involves judges' personal liability even when sued for decisions made in their official capacities. The summary of the findings is brief and can be quoted in whole:

> "Approximately half of the respondent Chief Justices reported that their jurisdictions have neither statutory indemnification nor insurance coverage for judges involved in litigation concerning their official duties. Fifteen states reportedly have indemnifiction statutes; another four appear to have some type of state indemnity practice. Only nine states provide statutory immunity to their judges. Fourteen respondents reported that their

jurisdictions have insurance that pays for some or all of the expenses involved in the litigation of claims against judges.

"Although almost all of the states have representation provided by the Attorney General (or other public legal office), specific information on the types of coverage for damages and attorney's fees provided under insurance policies and indemnification statutes is not comprehensive and was unknown by many respondents.

"Legislative activity to remedy the situation is currently minimal. Although 46 respondents reported not having judicial immunity statutes, 72% responded that such legislation is not being sought. Similarly, in the 40 states without statutory indemnification, 60% are not seeking such protection.

"Slightly more activity is being directed toward the procurement of insurance. Forty-five percent of the respondents report current negotiations for state-provided judicial insurance. Forty-four percent report that individual judges are beginning to purchase their own insurance policies."[15]

It is clear from this summary that the states, long relying on the doctrine of judicial immunity as the only protection needed for their judges, are not prepared to meet the present threat and that many judges are being forced to seek a limited and doubtful form of protection through insurance policies purchased at their own expense. The salaries of state judges, I need not remind you, do not make them an affluent class capable of absorbing large economic losses or adequately insuring themselves against them. The study was published in 1985 from data gathered in the late summer and fall of 1984.

The second study of interest covers the period from January 1982 to March 1985 and records a total of 957 cases. All but eight of the 48 states responding to the survey reported case filings against judges under the act. Noting the difficulty of collecting data on specific types of case filing, the report states that, "If there is a weakness in the data it is undoubtedly one of underrepresenting the volume of litigation — rather than overstating it."

In a key finding the study reports that:

> "...litigation under Section 1983 is increasing yearly. Between 1982 and 1983, the total nunber of reported filings increased from 177 to 264, or 49%. From 1983 to 1984, the filings increased 45%, from 264 to 382. Although it is too early to accurately measure the increase from 1984 to 1985, an estimate of 1985 filings can be derived by

multiplying the figure for the first quarter by four. This rough estimate of a projected 536 cases also indicates a steady increase in case filings."

The bulk of these cases, the study found:

"...are being brought by disgruntled litigants who view Section 1983 as a means of redress against judges who have ruled against their interests in previous lawsuits. It is clear from the case statistics that very few of the cases are decided (or settled) favorably to plaintiffs. Yet, in only a very few of these suits have attorney's fees and costs been awarded against the plaintiff for the 'frivolous' nature of the suit."

The study also reports that:

"Despite the fact that many of these suits are brought pro se, or by litigants not represented by counsel, the yearly statistics indicate a steady and slightly increasing level of requests for attorney fees. In almost all of the successful cases, 'prevailing plaintiffs' have either been awarded attorney's fees or had their cases settled for a figure that takes into account and represents the costs of representation.

"A final important finding is the fact that although most of the cases are brought against judges for actions committed within their judicial roles, the successful cases (with only a few exceptions) concern administrative or nonadjudicative conduct."[16]

It is clear that costs imposed on local, state, and federal governments under federal fee shifting statutes are an ever growing burden. While the overwhelming majority of fee awards are against officials of the executive branch, the judiciary, as indicated by the study above, has been increasingly involved, primarily in civil rights actions challenging decisions by judges in their rulemaking, enforcement, and administrative or magisterial roles as well as in the adjudication of cases. For many state judges, particularly those with rulemaking and management responsibilities, suits challenging their non-judicial actions may be the most burdensome. Thus, the Conference of Chief Justices has supported legislation that would remove the threat of fee awards in cases challenging all actions taken by judges in their official capacities. However, in light of the Supreme Court's most recent pronouncement on the reach of judicial immunity in Forrester v. White (No. 86-761) decided January 12, 1988, we would amend our position to exempt only judicial or adjudicatory actions of judges as distinct from actions taken in an administrative capacity.

Such fees, particularly when incident to federal injunctive relief, are unnecessary and counterproductive. They are unnecessary because, as we have noted, adequate remedies are available within state judicial systems through the normal channels of appeal or other routine remedies. They are counterproductive because they serve no public interest more important to a free society than the doctrine of judicial immunity underlying the detachment and integrity of the judicial process. The threat of catastrophic economic loss, however subtle, necessarily undermines that process and therefore undermines the rights of all. In the Pulliam case, as we have noted, the original complaint protested incarceration for failure to make bail on a non-jailable offense. This complaint was taken directly to a federal district court, bypassing the Virginia district and appellate courts with full power to provide relief under Virginia law. The final claims for attorney's fees in this case were in excess of $80,000 and resulted in a final settlement between $40,000 and $50,000 for which the state magistrate, as we understand it, was personally liable. Fortunately for her the burden was assumed by the state but charged against the budget of the judiciary where, presumably it required a cutback in judicial services available to the people of Virginia.

The long and complex history of immunity doctrines attests to the judiciary's need, along with that of legislators and prosecuting attorneys, for a stricter standard than that generally granted to the executive officials that Congress had most clearly in mind in passing the Attorneys Fees Act in 1976. More so than most if not all public officials judges are personally charged with responsibility for discretionary decisions affecting the most precious rights of their fellow citizens. There will be one or more disgruntled parties in virtually every judicial proceeding, civil or criminal. Judges, obviously, are in the business of judging, and to judge in the United States today is to weigh the merits of conflicting claims and rights against requirements of the most complex and volatile body of law known to man. Our system therefore recognizes that judges may err and provides for the correction of judicial error through appeal by right to higher tribunals. Thus, judges make difficult factual and legal determinations on a daily basis and routinely rule on unsettled questions of law or settled questions that can change on appeal. Under Pulliam such decisions now can come back to haunt state judges in the form of injunctive relief and attorney's fees ordered by a federal district court.

Even more intimidating, as Justice Powell noted in his dissent in Pulliam, is the threat of contempt if a state judge, in the view of a federal judge, fails to adequately implement the federal court's injunctive order. The order at issue in Pulliam, as Justice Powell noted, contained language requiring discretionary action by the state magistrate involved. This led Justice Powell to conclude that:

> "The threat of contempt — with the possibility of a fine or even imprisonment -- could well deter even the most courageous judge from exercising

this discretion independently and free from intimidation."

Surely Congress did not intend, in a limited and carefully crafted reaction to the Alyeska decision, to encourage or set the stage for so dramatic an extention of federal judicial power over state judicial proceedings.

We do not suggest that state judges should be completely beyond the reach of the federal courts to redress violations of federally protected rights if the state courts fail to do so. Nor would anything we propose affect existing rights to redress routinely available by writ of certiorari in the Supreme Court of the United States and by writ of habeas corpus in federal district courts. But we do contend that state courts are as dedicated to the protection of federal rights as are the federal courts and that error, if it occurs, normally can be corrected on appeal within the state court systems. Surely we can now agree that state courts should no longer be compared to some courts of the turbulent Reconstruction Era whose transgressions were among those by state officials that led Congress to enact restraints on state action violating federally protected rights. This view was endorsed by the Pulliam Court which agreed that "Much has changed since the Civil Rights Acts were passed. It no longer is proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation."

Under the Supremacy Clause, the oath of state judges requires the same fidelity to the Constitution and laws of the United States as does the oath of their colleagues on the federal bench. There is little reason to believe that state judges are violating that oath, or that they are uninformed on questions of federal law, especially at the appellate level. As former Chief Justice W. Ward Reynoldson of Iowa stated in testimony before the Senate Judiciary Committee, "there is hard evidence to show how intertwined state and federal law has become." Among the 281 published opinions of the Iowa Supreme Court in 1981, he said, 150 involved criminal appeals. Seventy-two of these opinions cited a total of 327 federal decisions. In addition, 53 federal cases were cited in eight post-convictions and 57 civil cases cited a total of 188 federal opinions. Twenty of the opinions, he added, cited the United States Code and 27 cited the federal rules of civil or criminal procedure or the federal rules of evidence. "I am convinced," Chief Justice Reynoldson said, "that Iowa appellate justices spend almost as much time in the federal reporters as in state reporters. Downgrading the sense of responsibility, experience and training of modern-day state judges ignores the enormous strides made in state judicial systems."[17] That is a view I emphatically share as would the overwhelming majority of my colleagues on state supreme courts. And all of us could, I am certain, cite similar statistics illustrating the increasing importance of federal rules, procedures, and case law in state adjudications.

Moreover, the trend has been away from federal courts to state courts. There is growing evidence of the important role state courts are playing in the development of constitutional law, particularly in the expansion of individual rights, through interpretation of their own state constitutions. On this point Justice William Brennan has said:

> "We can and should welcome this development in state constitutional jurisprudence — indeed, my own view is that this rediscovery by state supreme courts of the broader protection afforded their own citizens by their state constitutions — spawned in part certainly by dissatisfaction with the decisional law being announced these days by the United States Supreme Court — is probably the most important development in constitutional jurisprudence in our times. For state constitutional law will assume an increasingly more visible role in American law in the years ahead."[18]

In a similar vein, Lanny Proffer, general counsel for the National Conference of State Legislatures, has noted that:

> The die is cast. state judiciaries seem willing, even determined, to assume a larger role in judicial

> federalism. Though lacking in the independence born of life tenure, state justices are attacking the hard cases: abortion funding, freedom of expression and criminal procedure. It seems ordained that much of the constitutional law for the rest of the century will be made in state courts on the issues that most affect the individual: drug testing, education reform, AIDS, civil liberties, environment and economics.
>
> This is not to denigrate the role of the federal courts, particularly the U.S. Supreme Court, which will continue its pre-eminence. But anyone who considers the work of those who drafted our federal Constitution cannot fail to be encouraged that the state courts are now filling the role intended for them: to take care that the liberties of the people are protected from encroachment from whatever source. That task is big enough to accommodate the justices of the federal and state benches.[19]

The importance of new developments in state constitutional law also is attested by the growing number of articles and scholarly seminars on the subject as well as the fact that state supreme court decisions now are being reported nationally through the "State Constitutional Law Bulletin" of the National Association of Attorneys

General. The American Civil Liberties Union also appears to have taken note of this trend and, according to the Legal Times, was looking for "appropriate ways" to raise state constitutional issues in state courts in order to shield certain criminal law issues from review by the Supreme Court of the United States.[20]

In the final analysis Pulliam is destructive because it deters state judges from enforcing the law. Hardly a week goes by without a judge of the courts of Oregon receiving threats of suits by disgruntled litigants. Some judges, in face of the threat of a substantial attorney fee award say, "It's not worth it," and yield.

Let me give an example of this threat from my own experience. Oregon has a statute that provides for the recapture of a portion of the fees paid by the state to counsel assigned to indigent defendants. Before ordering such repayment by the defendant the case must be closed and the court must determine that he is financially able to bear the expense.[21]

Under this statute a trial judge assessed an indigent defendant, who was acquitted of a criminal charge, with the cost of the court-appointed attorney's fee. The defendant brought suit against me as Chief Justice in the United States District Court, requesting injunctive relief, Fitch v. Belshaw.[22]

The federal judged ruled in favor of the plaintiff and entered an award of attorney fees against me in the sum of $35,000. The court held:

> "Oregon Revised Statute 135.055(6) allows a judgment to pay costs of court-appointed counsel to be entered against an indigent defendant, with no procedure to insure defendant is or will be able to repay without substantial hardship. In practice, the State draws attention to the potential obligation at the time an indigent defendant requests court-appointed counsel. I find that ORS 135.055(6) unconstitutionally chills an indigent's exercise of Sixth Amendment right to counsel."

" * * * * *

> "Oregon Revised Statute 135.055(6) cannot be constitutionally applied in absence of the safeguards of procedural due process. The statute provides neither notice nor hearing. There is no evidence that the State's practice is to supplement the statute with the necessary elements of due process. As a result, indigent defendants are deprived of liberty and property in violation of the Fourteenth Amendment Due Process Clause."

It is important to note that this case involved actions of judges enforcing statutes passed by the Oregon legislature, according to the terms of the statute. Therefore, it involved claims against judges for enforcing laws which, under their oath, they were required to enforce.

As one who has had the experience I wish I could assure you that the threat of substantial attorney fee awards does not to any degree divert judges from conduct they believe to be fair, correct and constitutional. But judges are human and in reality the potential for such suits bring to bear all that is necessary to divert a judge's attention from deciding the cases before him to defending against the possible suit. This potential for intimidation can subtly affect judicial decisions whether we like to admit it or not. Legislators enjoy immunity from personal liability if acts they pass are later determined to be unconstitutional. Should not judges enjoy immunity from the award of attorney fees for enforcing their laws? Judges take an oath to uphold the law. Freedom from the award of attorney fees under Section 1988 is essential if they are to do so and we are to maintain an independent judiciary.

A mere contemplatation of the problems confronting state and municipal judges would indicate beyond any doubt that imposing the straight jacket of injunctive limitations upon a judge will destroy his or her usefulness to a far greater extent than the possibility of a suit for damages. Indeed, I suggest that once a judge has been enjoined by an order restricting his or her discretion, the usefulness of that judge is, to all practical intents and pruposes, eliminated. Many times a state judge will not know that he or she has made a mistake until the Supreme Court of the United States issues a new opinion which may destroy the constitutional base upon which the state judge thought the action to be founded. No great citation of authority is needed to establish the proposition that the Supreme Court of the United States has in recent years made a number of changes in its constitutional adjudication that affect the daily decisions of state judges, particularly in relation to the exclusionary rule.

The specter of harassing litigation brought by disappointed parties against judicial officers of all types of jurisdiction is a chilling prospect, indeed. At a time when the courts of this country are overburdened with litigation, at a time when citizens seek redress in the courts for a greater variety of perceived wrongs than ever before, it seems ill-advised to add a new layer of distracting litigation upon the shock troops of the judicial system. Such flank attacks upon judicial officers can only result in increasing timidity and a tendency to avoid close and controversial decisions when ever possible. It inevitably produces a syndrome of responses inconsistent with an American judiciary dedicated to the protection of individual liberties.

Finally, Mr. Chairman, we should not forget that state courts existed before the federal system and for the first 100 years of our national life were the courts of original jurisdiction for federal as well as state law questions. Because they remain the only courts of general jurisdiction, and their jurisdiction cannot be restricted by Congress as can that of the lower federal courts, it is reasonable to view state courts as the ultimate forums for the protection of rights under the federal as well as state constitutions. Modern state courts are responsible components, and partners, in the most fair, sophisticated, and effective system of justice ever devised by man. They should not be viewed as inferior tribunals requiring daily oversight by individual judges on the federal bench. We are confident that Congress, after full deliberation, will share that view and grant us the relief we seek.

Thank you again for your assistance in bringing this critical issue to the attention of Congress. I will be pleased to respond to any questions you may have have and to provide additional materials for the hearing record.

Notes

1. 446 U.S. 522 (1984)

2 42 U.S.C. 1983 reads:
"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3 42 U.S.C. 1988 reads in pertinent part:
"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

4 421 U.S. 240 (1975)

5 Senate Report No. 94-1011, 94th Congress, 2d Session. The Report states that there were 30 witnesses, including "Federal and State public officials", during six days of hearings in 1973. But it does not identify the public officials or indicate what their testimony might have been.

6 Senate Report No. 94-1011 at 6.

7 386 U.S. 547 (1967)

8 These are not available via the Senate Judiciary Committee's Document Room.

9 "Awarding of Attorneys' Fees", Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, 94th Congress, 1st Session, October 6, 8, and December 3, 1975. Serial No. 64.

10 121 Cong. Rec. S. 14975 (daily ed., Aug. 1, 1975),

11 122 Cong. Rec. 35126

12 Recent articles include "The Twilight of Judicial Independence — Pulliam V. Allen", by Justice Joseph R. Weisberger of the Supreme Court of Rhode Island, Suffolk University Law Review, January 1986. The Summer 1982 edition of "The State Court Journal", published by the National Center for State Courts, Williamsburg, Va., contains articles tracing the history of the judicial immunity doctrine, a national survey of suits against judges, and a review of recent literature on judicial immunity.

13 The key cases before Pulliam v. Allen are discussed in the "State Court Journal" cited above.

14 The Conference of Chief Justices' Official policy position: "Urges the United States Congress to exempt state judges and judicial officers, acting in their official capacities, from assessment of attorney fees pursuant to 42 U.S.C. 1988."

15 In "Survey of State Statutes and Current Activities Regarding Judicial Immunity, Indemnification and Insurance", conducted by the National Center for State Courts, Williamsburg, Va., for the Conference of Chief Justices Ancillary Committee on Judicial Immunity and Ancillary Task Force to Prepare Report on Impact of Pulliam v. Allen, January 1985.

16 In "42 U.S.C. 1983 Litigation Against Judges: Survey Results", prepared by the National Center for State Courts for the Conference of Chief Justices Task Force to Prepare a Report on the Impact of Pulliam v. Allen, September 1985.

17 In Hearings of the Senate Judiciary Committee, 97th Congress, 2d Session, on S. 2216, The Habeas Corpus Reform Act of 1982, April 1, 1982, Serial No. J-97-108, at 238.

18 Quoted by Paul Marcotte in "Federalism and the Rise of State Courts", ABA Journal, April 1, 1987, Page 64.

19 "State Courts and Civil Liberties", in State Legislatures, September 1987, Page 28, National Conference of State Legislatures, Denver, Colo.

20 "Supreme Court v. Civil Liberties, The ACLU's New Strategy of Avoidance", the Legal Times, June 1, 1987. Also see "State Courts Move Beyond U.S. Bench in Rights Rulings, Cite Own Constitutions", The New York Times, Sunday, May 4, 1986, Page 1-A. Two national conferences on developments in state constitutional law have been sponsored by the Conference of Chief Justices in conjunction with the National Center for State Courts and the Marshall-Wythe School of Law of the College of William and Mary, Williamsburg, Va. A major "Seminar on State Constitutional Law" is scheduled in Washington, D.C. March 11, 1988 by the National Association of Attorneys General.

21 The statute provides:

"Upon completion of all services by the counsel appointed pursuant to ORS 135.045 or 135.050, the court shall determine whether the person for whom counsel was appointed is able to pay a portion of the compensation and expenses paid by a county or the state. In determining whether the person is able to pay such portion, the court shall take into account the other financial obligations of the person, including any fine or order to make restitution. In addition to any agreement to repay under ORS 135.050(4), if the court determines that the person is able to pay such portion, the court may order the person to pay the portion to the appropriate officer of the county or state."

22 USDC, Or., Civ. No. 83-991-PA.

QUESTION FROM SENATOR GRASSLEY
FOR THE HEARING ON JUDICIAL IMMUNITY
JUDICIARY SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

QUESTIONS FOR PANEL II

1. Opponents of these bills say we need not worry about federal courts enjoining state court judges. After all, they say, principles of "federalism" and "comity" will force federal court judges to "bend over backwards" to avoid issuing injunctions. Do you agree that there's nothing to worry about?

2. Would any of the three proposals (S. 1512, S. 1515, S. 1482) immunize the judiciary from liability in the following situations:

a. alleged dicrminatory hiring practices of court employees;

b. disciplinary actions taken against lawyers for professional or ethical misconduct;

c. refusal to admit an attorney to practice before a particular court.

3. Although I am generally supportive of the thrust of the pending legislation, in no way do I favor the notion that the judiciary becomes a kind of "royalty" simply by donning the judicial robe. Judges, being human, can be as autocratic and arbitrary as any of us. How should we check this type of conduct if not by the threat of lawsuit?

Answers to these questions are appended.

ANSWERS TO QUESTIONS FROM SENATOR GRASSLEY FOR THE HEARING ON JUDICIAL IMMUNITY JUDICIARY SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

Answer to Senator Grassley's Question No. 1:

No, this argument by opponents of these bills misses the mark.

First, the mere fact that a state court judge may be brought into federal court litigation--to answer interrogatories, to be haled into depositions and to have his or her personal thoughts and files upon which adjudicative decisions were based--threatens judicial independence and results in state court judges avoiding decisions likely to promote controversy and federal litigation. The federal district court may indeed eventually recognize that federalism or comity mandate abstention and may spare the state court judge the burden of a trial. But that is not to say that a state court judge will be spared the other aspects of litigation--e.g. motion practice, pleading, interrogatories, depositions and discovery--which may equally discourage the judge from exercising the discretion and independence vested in him or her by the state constitution. As recognized in Forrester v. White, the prospect of a state court judge having to defend his decisions via a lawsuit in federal court, rather than by the state's normal process of review, provides "powerful incentives for judges to avoid rendering decisions likely to provoke such suits." ___ U.S. ___, 108 S.Ct. 538, 544, 98 L Ed 2d 555 (1988). "In this way, exposing governmental officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it." 108 S. Ct. at 542.

Harassment of state judicial officers is a factor not to be taken lightly or not to "worry about." As stated in the Pulliam dissent:

> "[H]arassing litigation and its potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees. Perhaps for understandable reasons, the Court's [majority] opinion passes lightly over the effect of [42 USC] § 1988. In fact, that provision has become a major additional source of litigation. Since its enactment in 1976, suits against state officials under § 1983 have increased geometrically. * * * The lure of substantial fee awards, now routinely made to prevailing § 1983 plaintiffs, assures that lawyers

> will not be reluctant to recommend and press these suits. The Court again ignores reality when it suggests that the availability of injunctive relief under § 1983, combined with the prospect of attorney's fees under § 1988, poses no serious threat of harassing litigation with its potentially adverse consequences for judicial independence."

466 U.S. at 555-57 (footnotes omitted).

Second, if federal court judges had the same strict notions of comity (i.e. they all "bent over backward to avoid issuing injunctions"), then Pulliam v. Allen would not have occurred. It may well be that the deference of the current federal bench to state systems of judicial review may, in effect, ensure that there will be few intrusions into matters of state soveriegnty. However, the purpose of judicial immunity legislation is to ensure that the integrity of state systems of judicial review are protected not only by the awareness of current federal judges of the position of the federal court in a federalist system, but also by statutes under which future decisions on comity or abstention are made.

Answers to Senator Grassley's Question No. 2:

2a. None of the three versions proposed would immunize the judiciary from liability for discriminatory hiring practices. S. 1482 proposes judicial immunity against attorney fees under section 1988 if the judge "would be immune from actions in damages arising out of the same act or omission about which complaint is made." This is the same as stating that a judge is not subject to section 1988 attorney fees if he is acting in a judicial capacity. See Forrester v. White, ___ U.S. ___, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988). S. 1512 and S. 1515 similarly propose that a judge will not be liable if he or she has acted in his or her "judicial capacity." The effect of all three proposals is to make a judge immune from attorney fee awards if he or she would be immune under traditional rules of immunity from money damages, i.e. if the judge's actions were taken in the judge's judicial capacity.

Forrester is dispositive of this question. Forrester was a section 1983 action involving the defendant state court judge's authority under state law to hire and fire probation officers. The defendant had hired and later fired the plaintiff, the plaintiff brought a section 1983 action alleging that she was discharged on the basis of her sex in violation of the Equal Protection Clause of the Fourteenth Amendment. In determining the immunity issue, the Court employed a "functional approach" under which the Court examined "the nature of the functions with which a particular official or class of officials has been lawfully entrusted" and evaluated "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." 108 S. Ct. at 542. The Court distinguished between judicial functions and administrative functions, stating that it was the nature of the function performed--adjudication--rather than the identity of the actor who performed it--a judge--that determines whether absolute immunity attaches to an act. Id. at 544, 545. The court recognized that difficulties have arisen in the attempt to draw the line between "truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." Id. at 544. The employment decision made by the present judge, the Court stated, was an administrative one:

> "In the case before us, we think it is clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts--like many others involved in supervising court employees and overseeing the efficient operation of a court--may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires and fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other executive branch official who is responsible for making such employment decisions."

Id. at 545.

2b. Under all three proposals a judge would be immune from section 1988 attorney fee awards if the judge would have enjoyed the traditional immunity against money damages had such an action been brought. Under Forrester's functional approach, whether a judge is immunized from liability for disciplinary actions against lawyers for professional or ethical misconduct depends upon the role the judge takes in the disciplinary action. If under the state system a judge is assigned by law to act as a prosecutor in the enforcement of a state bar code of conduct, then for immunity purposes that judge will be treated like an executive department prosecutor and would be amenable to suit for injunctive and declaratory relief. Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 734-37, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980) cited in Forrester, 108 S.Ct. at 545. If the judge is acting as an adjudicator or as part of an adjudicatory panel hearing disciplinary charges against an attorney, or if the judge is acting to discipline an attorney as a sanction for contempt of court by invoking a power "possessed by all courts which have authority to admit attorneys to practice," the judge is acting in a judicial capacity, Bradley v. Fisher, 13 Wall. 335, 354, 20 L.Ed. 646 (1872) cited in Forrester, 108 S.Ct. at 544.

2c. Bradley v. Fisher, supra, suggests that the decision to admit an attorney to practice before a particular court is historically a "judicial function" and not one for which a judge may be subjected to an action for money damages.

Answer to Senator Grassley's Question No. 3:

In a nutshell, this proposed legislation does not suggest that judges should be without checks; it simply states that litigants dissatisfied with a state judge's actions must protest through the normal state system of review without haling a state judge into federal court. If the state does not provide adequate remedies for dissatisfied litigants, the federal court may still play a role in regulating their state counterparts. As recognized by Forrester, "[m]ost judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability," namely the "incentive to avoid rendering decisions likely to provoke such suits." 108 S.Ct. at 544. In a federalist system, one should at least accord state courts the prerogative to correct alleged errors within their own state systems of review. Even the Pulliam majority conceded that [i]t is no longer proper to assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation. 4bb J.S. at 541.

That "[m]ost judicial mistakes or wrongs are open to correction through ordinary mechanisms of [state] review" is not better demonstrated than in Pulliam v. Allen itself. To repeat a Pulliam dissent quotation, 466 U.S. at 554-55 nn 13-14: (quoted earlier in response to a question from Senator Thurmond):

> "13. The Court says that 'it may have been impossible for respondents to avail themselves of other remedies provided by Virginia law. * * * Virginia law, however, provides two specific remedies

for alleged unlawful detention. Virgina Code § 8.01-654 (Supp 1983) proves that a 'writ of habeas corpus . . . shall be granted forthwith by any circuit court' to any person who shows there is probable cause to believe his is being unlawfully detained. * * * Moreover, Virginia Code § 19.2-124 (1983) provides a specific procedure for appealing unreasonable bail determinations "successively to the next higher court * * .' The Court suggests that in view of the short duration of pretrial detention here, these remedies may not have been available. There has been no showing to this effect. * * *"

"14. Responding to the dissent, the Court states that there has been no showing of unavailability of alternative remedies because petitioner never challenged the injunctive relief awarded. The point, however, is that this suit for injunctive relief was allowed to proceed against a judicial officer without a showing, or finding by the District Court, that alternative remedies were unavailable, or that there would be irreparable harm."

The situation that the dissent describes in notes 13-14 is exactly what the new legislation should prevent.

One must avoid the temptation to think of state judges as being of the same type of "untouchable" quality as federal judges. Although I have not done a nationwide survey, most state court judges are either elected for a set term of years or appointed by the governor subject to losing their seat at "approval" elections (e.g. former Chief Justice Bird of the California Supreme Court). In that sense, autocracy and arbitrariness are checked in the state courts in much the same manner as they are checked in any elective body: by popular election.

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QUESTIONS FROM SENATOR THURMOND
FOR THE HEARING ON JUDICIAL IMMUNITY
JUDICIARY SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

QUESTIONS FOR PANEL II

1. As judges, what impact, if any, has the Pulliam case had on your day to day decision making in the courtroom?

2. The decision in Pulliam allows for a federal cause of action to be brought against a state court judge for injunctive relief. Do you believe that application of Pulliam gives the federal courts unnecessary authority over state judicial officers? Why or why not?

Answers to these questions are appended.

ANSWERS TO QUESTIONS FROM SENATOR THURMOND
FOR THE HEARING ON JUDICIAL IMMUNITY
JUDICIARY SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

Answer to Senator Thurmond's Question No. 1:

The Pulliam case casts a cloud over all judges. All judges do not respond in the same way. Unfortunately, many judges will be swayed because of the possibility of suit and the imposition of attorney fees.

One California judge--and I would just like to briefly quote him--wrote that although he had not been sued he has--

> "* * * declined to issue warrants for the arrest of certain people who failed to respond to subpoenas and orders to appear in court in the quite reasonable fear that a technical defect in the pleadings or service might result in his personal liability."

It is difficult to quantify the Pulliam effect. It is fair to say that no recent decision has created the widespread concern that has Pulliam. There is a strong force upon judges, in close cases, to say (inwardly or outwordly), "I'll avoid the risk and make the riskless decision." The result: judicial courage is replaced by judicial timidity.

Occasionally judges do things they shouldn't and a lawsuit may be the only alternative. But that is the rare case. In almost all cases, appeal is an adequate remedy. The threat of an attorney fee award is as great a threat to judicial independence as an award of damages.

While a lawsuit against erring judges may sometimes be the only alternative, albeit rarely, the threat to judicial independence from a claim for attorney fees can and should be eliminated.

Answer to Senator Thurmond's Question No. 2:

The question presumes that Pulliam clearly states the authority that federal courts have over state judicial officers. This is not the case; one of the purposes of the legislation is to clarify this very point. The confusion over Pulliam is as likely to result in state judges being haled into federal court as are the merits of the case.

This point may be best illustrated by an example. The Pulliam case may have turned out differently if the majority and dissent agreed on the issue of upon whom the burden fell to prove or disprove whether the state system could resolve the the threat to the plaintiff's civil rights or whether the state system provided adequate remedies. This battle was fought in the footnotes. To quote two of the dissent's footnotes, 466 US at 554-55 nn. 13 and 14:

> "13. The Court says that 'it may have been impossible for respondents to avail themselves of other remedies provided by Virginia law.' * * * Virginia law, however, provides two specific remedies for alleged unlawful detention. Virginia Code § 8.01-654 (Supp 1983) proves that a 'writ of habeas corpus . . . shall be granted forthwith by any circuit court' to any person who shows there is probable cause to believe his is being unlawfully detained. * * * Moreover, Virginia Code § 19.2-124 (1983) provides a specific procedure for appealing unreasonable bail determinations 'successively to the next higher court * * * .' The Court suggests that in view of the short duration of pretrial detention here, these remedies may not have been available. There has been no showing to this effect. * * *"
>
> "14. Responding to the dissent, the Court states that there has been no showing of unavailability of alternative remedies because petitioner never challenged the injunctive relief awarded. The point, however, is that this suit for injunctive relief was allowed to proceed against a judicial officer without a showing, or finding by the District Court, that alternative remedies were unavailable, or that there would be irreparable harm."

One can only wonder, after Pulliam, (1) whether the plaintiff or the defendant judge must make a showing of the unavailability/availability of adequate state remedies within the state justice system, and (2) what procedure and standard would be used to determine whether a federal court should grant declaratory or injunctive relief. The doctrine (or perhaps, more accurately stated, the doctrines) of abstention suggest that these burdens are on the plaintiff and that the federal district court should make a finding on the issue of unavailability of state remedies and irreparable harm before granting relief. See generally Wright, Law of Federal Courts, § 52 (4th ed. 1983). The Conference of Chief Justices suggests that the burden should be one the plaintiff because at the heart of the abstention doctrine is the concept that there must be a justification for federal court intervention.

Leaving aside for the moment the issue of whether Pulliam states a clear standard and whether Pulliam generates litigation involving state court judges as a result of its lack of clarity, insofar as Pulliam "allows for a federal cause of action to be brought against a state court judge for injunctive relief, I do strongly believe that "Pulliam gives the federal courts unnecessary authority over state judicial officers." The decision is contrary to what has been entitled "Our Federalism" by Professor Wright, "which teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of the state to enforce its laws in its own courts." Wright, Laws of Federal Courts 320, § 52A (4th ed. 1983).

It is the mere existence of such authority and the threat of its exercise that threatens judicial independence. It should be recognized that all members of the Pulliam Court agreed on the longstanding principle that judicial immunity serves as the bulwark against threats to "independent judicial decisionmaking." 466 U.S. at 531 (majority), 466 U.S. at 544 (dissent). The majority choose to distinguish prospective relief from an action for money damages. However, the reasons for absolute judicial immunity in the exercise of judicial functions are equally applicable to actions for money damages and actions for prospective relief and section 1983 attorney fees. To the extent that a judge may be haled into court as a defendant in an action for either damages or prospective relief, his or her powers of impartiality and discretion are sacrificed. "The ever present threat of burdensome litigation, made realistic by [the Pulliam decision], may well influence judicial determinations, particularly in close cases where the decision is likely to be unpopular." Pulliam, 466 U.S. at 554 (Powell, J, dissenting). The Pulliam dissent recognized that a "judgment [against a judge] poses the same threat to independent judicial decision-making whether it be labeled 'damages' of $7,691 or 'attorney fees' in that amount." Id. at 545. Section 2(1) of Senate Bill 1512 recognizes this same point.

The Pulliam dissent further recognized that with respect to the authority given to federal courts over state judges by the majority opinion: "Suits for injunctive relief pose greater threats to judicial independence if they are successful and an injunction is ordered." Id. at 555. Because an injunction order may be lengthy or unlimited in duration, a state judge remains under the threat of contempt of the federal court with respect to numerous litigants." Such a threat, "with the possibility of a fine or even imprisonment--could well deter the most courageous judge from exercising [his or her] discretion independently and free from intimidation."

2820M

Senator **Heflin**. Judge Raab, we are delighted to see you here and to hear from you now.

STATEMENT OF HON. IRA J. RAAB

Judge Raab. Thank you very much. I'm going to take away the prepared text and just add some things.

We agree generally with the statements made by the previous speakers, but I want to point out something to you with regard to the terminology of the three bills. There is some inconsistency in the terminology of the judicial officers.

In S. 1512, you refer to them as "Justice, Judge or Judicial Officer." In S. 1515, you just say the words "Judicial Officer." And in S. 1482, section 614(a), you say "Judge or Judicial Officer."

Now, I might recommend that you be consistent and just say judicial officer, which would apply to all three of the titles.

Second, there may be some overlap with the three bills and perhaps it might be a good suggestion if the committee got together with some of the representatives of the organizations that are here now speaking before you and perhaps you can get a more consistent single bill that will solve all of the problems that we are talking about.

I just wanted to point something else out to you. In the *Pulliam* case, I understand that the legal fees that were asked by the end of the whole proceedings were about $80,000. They had settled on $40,000. After the original determination it was only $7,700. That is in 1984 dollars.

Today, with today's dollars, perhaps it will be $100,000 and that's more than probably any trial judge makes in this whole country, and that's a scary thing.

If a judge is going to have to make a decision this way or that way, and somewhere up there is hanging the possibility that the entire salary that he's making is going to go for attorneys' fees, that's a real problem to a judge in making a decision. And I think that should be considered by the committee in reversing it. Thank you.

Senator **Heflin**. Without objection, the statement of Judge Ira Raab will be placed in the record in its entirety at this point.

[The prepared statement of Judge Raab follows:]

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American Judges Association

Serving the justice system since 1960

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February 26, 1988

STATEMENT BY THE AMERICAN JUDGES ASSOCIATION TO THE U.S. SENATE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE IN SUPPORT OF LEGISLATION TO REVERSE PULLIAM V. ALLEN.

The American Judges Association strongly supports legislation pending in Congress to reverse the impact of Pulliam v. Allen, 104 S.Ct. 1970 (1984), which case held that judicial immunity is not a bar to prospective injunctive relief and to an award of attorney fees in a civil rights action against a judicial officer acting in her judicial capacity.

AJA is a 28 year old national organization of about 1,800 state and federal judges and judicial officers, representing courts of all jurisdictions from the 50 states, District of Columbia, the U.S. Territories and Canada. Its Secretariat is the National Center for State Courts. Its objects and purposes are primarily to promote, advance and improve the prompt and effective administration of justice and to promote and maintain the professional status and independence of the judiciary.

The independent organization for all local, state, and federal judiciary
of judges—by judges—for judges

One of its goals is to take stands on issues affecting the judiciary and the administration of justice and to take actions when appropriate. It is with this goal in mind that AJA President, Judge Robert H. Wahl, the Chief Judge of the Court of Common Pleas, Wilmington, Delaware, asked me to appear before you today to present the views of AJA, its Executive Committee, its Board of Governors, and its membership. We thank you for giving us this opportunity.

AJA would like to add its voice to those of the Conference of Chief Justices, the Judicial Conference of the United States, the American Bar Association, and others, in urging the 100th Congress to enact S. 1512 (State judges not to be liable for attorney fees in judicial actions against State judges), S. 1515 (Prohibit injunction relief or damage award against judges acting in an official capacity), and S. 1482 (Prohibit an award of attorney fees against a judge who would otherwise be immune from actions for damages).

The loss of judicial immunity, in any degree, would do great harm to the administration of justice under the American judicial system. A free and independent citizenry cannot exist in the absence of a free and independent judiciary. The fear of law suits may very well adversely influence judicial determinations and prevent judges from making fair decisions.

Judicial immunity, like any other fundamental legal doctrine, would lose its protections, if litigants were allowed to chip away at it. If injunctive relief and awarding of attorney fees are allowed today, then what will be allowed tomorrow? What about special damages or general damages? Is not attorney fees a part of damages? Where will it end? A stand must be taken today to guarantee a free and independent judiciary.

At the April, 1985 Mid-Year Conference in Cleveland, Ohio, AJA adopted a Resolution in favor of the minority opinion in Pulliam vs. Allen, and a letter was sent to every member of the House of Representatives and the United States Senate in support of legislation to reverse the majority opinion. No such legislation was passed.

At the October, 1986 Annual Conference in Kona, Hawaii, AJA adopted a second Resolution urging the federal legislators to introduce and support legislation that would provide that no judge should be held personally liable in any proceeding brought against said judge for actions taken in an official capacity. By this Resolution, AJA remained convinced that the majority findings in Pulliam would undermine the fundamental doctrine of judicial immunity which guarantees a free and independent judiciary. This Resolution was mailed to every member of the House and Senate and to U.S. Attorney General Meese and to President Reagan.

Justice Blackmun, in delivering the opinion of the Pulliam majority, held on Page 1982:

> "... it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common law immunity."

The American Judges Association urges Congress to pass legislation to prohibit the award of injunctive relief, and/or attorney fees against judges or judicial officers for any acts committed in their official capacity, and within the appropriate jurisdiction of the court.

The Subcommittee on Courts and Administrative Practice is to be commended for bringing this matter on for public hearings.

RESOLUTION

WHEREAS, the American Judges Association has previously gone on record as endorsing and supporting Federal Legislation which would, in effect, legislate against the finding in the 1984 Supreme Court case, Pulliam v. Allen, wherein state judges may be ordered to pay attorneys fees in cases where state judges are sued in Federal Court in certain civil rights cases; and

WHEREAS, the said legislation in its original form failed in the legislature; and

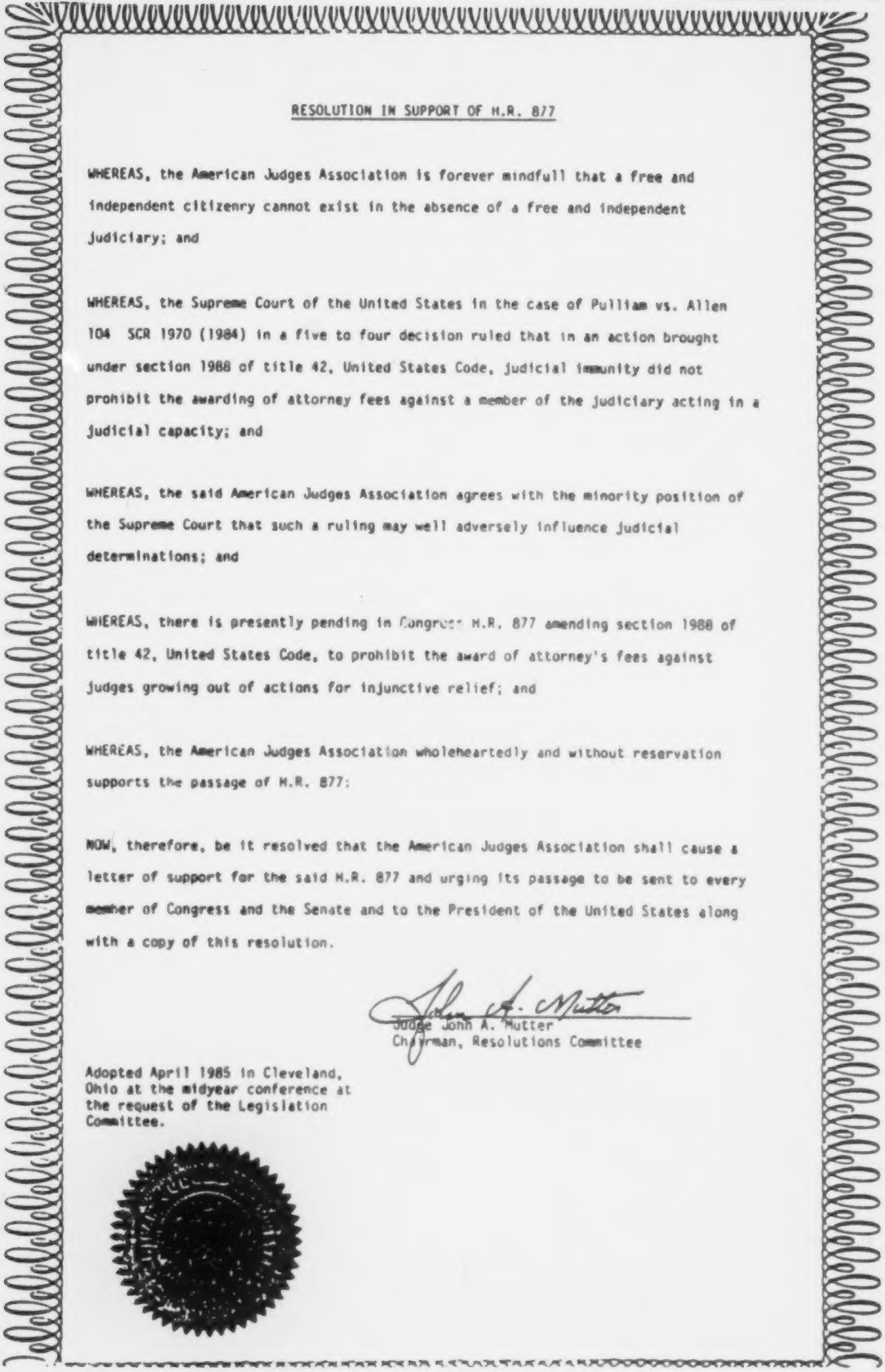
WHEREAS, the American Judges Association remains convinced that the findings of Pulliam v. Allen would undermine the fundamental doctrine of judicial immunity which guarantees a free and independent judiciary.

NOW, THEREFORE, be it resolved that the American Judges Association urges each member of the Federal Legislature to produce and support legislation which would provide that no judge should be held personally liable in any proceeding brought against said judge for actions taken in an official capacity, and further that copies of this resolution be sent to each member of the U.S. Senate and House of Representatives, to U.S. Attorney General Meese and the President of the United States.

John A Mutter

Judge John A. Mutter
Chairman, Resolutions Committee

Adopted Kona, Hawaii
October 1986



RESOLUTION IN SUPPORT OF H.R. 877

WHEREAS, the American Judges Association is forever mindfull that a free and independent citizenry cannot exist in the absence of a free and independent judiciary; and

WHEREAS, the Supreme Court of the United States in the case of Pulliam vs. Allen 104 SCR 1970 (1984) in a five to four decision ruled that in an action brought under section 1988 of title 42, United States Code, judicial immunity did not prohibit the awarding of attorney fees against a member of the judiciary acting in a judicial capacity; and

WHEREAS, the said American Judges Association agrees with the minority position of the Supreme Court that such a ruling may well adversely influence judicial determinations; and

WHEREAS, there is presently pending in Congress H.R. 877 amending section 1988 of title 42, United States Code, to prohibit the award of attorney's fees against judges growing out of actions for injunctive relief; and

WHEREAS, the American Judges Association wholeheartedly and without reservation supports the passage of H.R. 877:

NOW, therefore, be it resolved that the American Judges Association shall cause a letter of support for the said H.R. 877 and urging its passage to be sent to every member of Congress and the Senate and to the President of the United States along with a copy of this resolution.

John A. Mutter
Judge John A. Mutter
Chairman, Resolutions Committee

Adopted April 1985 in Cleveland, Ohio at the midyear conference at the request of the Legislation Committee.

Senator **Heflin**. Judge Peterson, in a 1985 hearing on judicial immunity before the Senate Subcommittee on the Constitution, you referred to a 1984 study which indicated that 15 out of the 55 responding jurisdictions reported they had a judicial indemnification statute. You refer to this same study in your testimony.

Could you briefly describe these statutes for us? Has this study been updated and have any additional judicial jurisdictions adopted similar statutes?

Justice **Peterson**. Mr. Chairman, answering your second—the second part of your question first, the study is being updated and with your leave we will file updated material as soon as we can and before the record is closed in this case.

And, incidentally, I have a copy of that study which I would like to make a part of the record.

Senator **Heflin**. Without objection.

[Material submitted by Justice Peterson follows:]

42 U.S.C. §1983
Litigation Against Judges:
Survey Results

Conference of Chief Justices

Task Force to Prepare a Report on
the Impact of Pulliam v. Allen

September 1985

Task Force to Prepare a Report on the Impact of _Pulliam_ v. _Allen_

Chief Justice Edwin J. Peterson
Supreme Court of Oregon
Chairman

Chief Justice Charles R. Donaldson Supreme Court of Idaho	Chief Justice Gordon R. Hall Supreme Court of Utah
Chief Justice Ralph J. Erickstad Supreme Court of North Dakota	Chief Justice Jay A. Rabinowitz Supreme Court of Alaska

Chief Justice Joseph R. Quinn
Supreme Court of Colorado

Staff of the National Center for State Courts

Harry W. Swegle, Washington Liaison
Martha M. Parrish, Staff Attorney

Table of Contents

Page

Background Information 1

Summary of Responses 2

State Profiles 4

Survey Results

I. Number of 42 U.S.C. §1983 Cases Filed Against State Court Judges and Other Judicial Personnel
- Summary of Findings. 25
- Table 1 26

II. Capacity in Which Judges are Sued: Judicial or Administrative
- Summary of Findings 29
- Table 2 30

III. Disposition of Cases on the Merits of the Claim
- Summary of Findings 33
- Table 3 34

IV. Attorney Fee Awards to Plaintiff(s)
- Summary of Findings 37
- Table 4 38
- Table 4a 41

V. Attorney Fee Awards to Defendant(s)
- Summary of Findings 43
- Table 5 44

Conclusions 47

Appendix A: First Report of Pulliam v. Allen Task Force

Appendix B: Letter and Questionnaire Requesting Information

Background Information

At the 1984 Annual Meeting of the Conference of Chief Justices, the Conference expressed its concern over the recent decision of the United States Supreme Court in *Pulliam* v. *Allen*, No. 82-1432, 1984. In that landmark case, the Court held for the first time that judicial immunity is not a bar to injunctive relief against a member of the judiciary acting in the judicial capacity or to the award of attorney's fees under the Civil Rights Attorney's Fee Awards Act, 42 U.S. C. §1988. The Conference resolved to appoint from its membership a task force to develop studies concerning the impact of *Pulliam* on the independence of state judges and judicial officers.

The Ancillary Task Force to Prepare a Report on the Impact of *Pulliam* v. *Allen* met at the 1985 Midyear Meeting and issued a *First Report*. Among the group's recommendations was the finding that inadequate information on the volume of litigation filed against judges is a chief obstacle to studying judicial liability and proposing appropriate solutions to the problem. The Task Force resolved to survey the members of the Conference in an effort to collect comprehensive data. (See Appendix A, the *First Report of Pulliam v. Allen Task Force*, dated February 13, 1985, for copies of the resolutions and a review of the position of the Task Force on legislative reform of 42 U.S.C. §1988.)

Summary of Responses

The information contained in this report was requested from the 50 states and 5 territories in March 1985. The Chairman's request was confined to cases that have been filed under 42 U.S.C. §1983 from January 1982 to the present. (See the questionnaire and accompanying letter in Appendix B.) The deadline for compiling the case information was April 15; thus, the summary figures for 1985 approximately cover the first few months (or first quarter) of this year only.

The response rate was 87% with 48 states and territories reporting on their jurisdictions' experience in this area. Of these 48 respondents, all but eight states reported case filing activity against judges or judicial officers under 42 U.S.C. §1983.

A descriptive profile of each state's response is included in order to provide information on cases of particular interest and on the attorney fee awards. This section demonstrates the varying abilities of the respondents to provide comprehensive responses and also highlights their often insightful comments.

The Task Force appreciates the responsiveness of both its membership and the many state agency personnel who contributed information to this survey and verified their responses. Respondents were candid in their descriptions of the availability and adequacy of their case data. For the most part, respondents also were willing to disclose sensitive details regarding the litigation. Although we recognize that this initial survey does not answer all of the questions concerning Section 1983 litigation, we feel it is a fair description of the patterns that have emerged. If there is a weakness in the data, it is undoubtedly one of underrepresenting the volume of litigation--rather than overstating it. Several respondents commented on the difficulty of securing this information due to the burden of searching for the pleadings manually. Even in those jurisdictions with automated dockets, the possibility of oversight was described by several respondents.

State Profiles

The following summaries describe the case information provided by each jurisdiction. Detailed information (where available) on the claims involved in these suits, particularly those that have resulted in judgments or settlements against judges is included. The disclosed amounts of attorney's fee awards for both plaintiffs and defendants also are provided. Reported information on cases brought against judges on grounds other than 42 U.S.C. §1983 and cases filed prior to 1982 also is mentioned.

ALABAMA

Respondent, Jack C. Dixon, Staff Counsel to the Chief Justice reported five cases, none of which have resulted in judgment or settlement for plaintiffs. Three cases name as defendants, judges (as well as clerks and other nonjudicial court employees) and contest the state's garnishment proceedings, laws relating to the appraisal of property and judicial conduct regarding voluntary waiver of jury trials. Two of the cases involve disputes concerning administrative responsibilities of the State Supreme Court; one involving rules governing admission to the State Bar, the other contesting the present system of electing circuit judges and district attorneys.

ALASKA

Respondent Karla Forsythe, General Counsel, Office of the Administrative Director of the Alaska Court System, reported that the Attorney General indicated that there has never been a case in the state in which attorney's fees under 42 U.S.C. §1983 have been legitimately in issue. She provided information on three cases, two of which are pending at the pretrial stage. The third case, which is somewhat similar to the Pulliam facts, has been decided in favor of the defendant Magistrate. The plaintiff alleges that he was jailed for a nonjailable offense and has cited Pulliam in his appellate pleadings. His pending appeal to the Ninth Circuit has been described as without merit by the Attorney General.

AMERICAN SAMOA

Chief Justice Robert Gardner reports that there have been no suits brought against judges and judicial officers under 42 U.S.C. §1983.

ARIZONA

Chief Justice William A. Holohan wrote that the Attorney General's office has indicated that there are no pending cases against judges and that there have been no successful claims asserted against judges that resulted in assessment of attorney's fees.

ARKANSAS

Christopher Thomas, Executive Secretary of the Judicial Department reports that no cases have been brought under 42 U.S.C. §1983 (against judges or other judicial personnel) in either Arkansas state courts or the United States District Court for the Eastern District of Arkansas. The Clerk of the U.S. District Court (W. Dt. Ark.) thought that there had been two cases filed in that court, but he was unable to confirm it. Staff also was unable to secure information on these possible filings.

CALIFORNIA

Because the Attorney General does not represent all of the judges in the state, Ralph Gampell, Administrative Director of the Courts suggested that it would be best to poll the members of the California Judge's Association. A request for information to their 1600 members resulted in responses from 50 judges who had not been sued and 22 who had been the subject of suits filed since 1982.

All of the 22 suits (except five still pending) have been decided in favor of the defendant judges. Most of the claims concerned judicial conduct in various proceedings including child custody cases, criminal cases, a tax case, and an eviction hearing; as well as controversies concerning the management of the jury system. Cases involving administrative duties included a claim against the 15 page limitation on appellate briefs, a claim by a municipal court employee alleging employment and racial discrimination, and a wrongful discharge claim by a court reporter.

One judge responded that he had been sued several times by dissatisfied litigants. Although he did not include details of these cases, he described them as "crank" cases and reported that they were dismissed on motion of the County Counsel.

Another judge described in detail a "frivolous" action that was filed against him in 1981 and ultimately, dismissed. It involved a protracted legal dispute over possession of a horse.

One superior court judge wrote that although he has not been sued, he has "declined to issue warrants for the arrest of certain people who failed to respond to subpoenas and orders to appear in court in the quite reasonable fear that a technical defect in the pleadings or service might result in [his] personal liability." Similarly, another Superior Court judge wrote that he has been the subject of an "implied threat to file suit." He attached to his correspondence a copy of the transcript in a denial of bail hearing to illustrate the problems that he feels have been caused by Pulliam: "Even if no lawsuit is commenced, an unethical attorney can attempt to intimidate a judge with a threat, be it explicit or implicity, of a suit for damages or attorney fees. In my view, the conduct of the attorney in this case constituted misconduct, an act of contempt, and an unprofessional act which could have led to discipline by the State Bar. For various reasons relating to my philosophy and style, I chose to take no action against the attorney. However, Pulliam remains the law, and the problems encouraged by Pulliam remain."

Another superior court judge reported that a case filed in 1981 has recently been granted a rehearing in light of Pulliam. The Court of Appeal reversed judgment and remanded a case involving the Justice Court of San Benito as defendant because the trial court erroneously failed to exercise its discretion on the propriety of injunctive and declaratory relief and a section 1988 award against the defendant/Justice Court.

COLORADO

Howard M. Kirshbaum, a justice on the state's Supreme Court, reported that among the 56 cases filed since 1982 only one has resulted in judgment against defendant judicial officers. In that case, an action that successfully sought to strike down the residency requirement for admission to the state bar, the attorney's fee issue was settled out of court for $3,500. A case filed in 1980 also was included in this state's response because it is the "most serious case against the Colorado Judicial Department involving the issue of attorney's fees." The claim on behalf of juvenile plaintiffs, alleged a civil rights violation because of the juveniles' incarceration in an adult correctional facility. The parties stipulated to a settlement, which included improvements in jail conditions and damages of approximately $2,000 to each juvenile defendant. County and state correctional officials settled legal fees for approximately $60,000. The issue of the Judicial Department's liability for another $40,000 is still being litigated. Justice Kirshbaum notes that it may result in an award of attorney's fees of some magnitude this year.

Among the unsuccessful claims are §1983 suits contesting judicial conduct in foreclosure procedures, complex property disputes, calculation of "good-time" (criminal sentencing), confiscation of personal property, administration of an estate, domestic relations cases, garnishment proceedings, the incarceration of a mental patient, demands for jury trials, and a wrongful death action. One plaintiff brought suit unsuccessfully against a judge who allegedly slept through his preliminary hearing. In one of these claims, the Court awarded attorney's fees to the judge/defendant. It is interesting to note that this case sought to enjoin enforcement of a judgment of attorney's fees to attorneys who were forced to relitigate another unrelated suit against the plaintiff and his clients.

Several actions were brought unsuccessfully against the Supreme Court (and Board of Bar Examiners) for an alleged conspiracy (restraint of trade against minority lawyers), denial of bar admission, challenge to legal education requirements, a contested decision involving the unauthorized practice of law, and a contested suspension from practicing law. Other claims against the judiciary in an administrative capacity include pending claims concerning handicapped access to court facilities, wrongful discharge of an employee, and denial of access to county law library. In the case alleging wrongful discharge, the claim against the Justices has been dismissed, but the State Court Administrator remains a defendant.

This respondent also notes that requests for §1988 fees are becoming routine. The number of §1983 cases which contain no request for attorney's fees, are in his view, a reflection of the pro se nature of the plaintiff rather than an absence of interest in such an award.

CONNECTICUT

Chief Justice Ellen A. Peters reports that there have been "no Pulliam cases" filed in the state.

DELAWARE

The Department of Justice provided information on eight cases involving judicial defendants in their adjudicative capacities. All but one have been dismissed; one remains pending. The pending suit primarily concerns complaints against a judge's judicial decisions but also alleges improper conduct at a Board of Professional Discipline hearing.

Of particular interest, are two dismissals in which the defendant Superior Court requested attorney's fees to be awarded against plaintiffs. Richard L. Williams, Deputy Attorney General, reported that one of these requests (a claim for fees of approximately $3,000) was recently awarded. The pending request seeks $4,460.

DISTRICT OF COLUMBIA

Respondents Larry P. Polansky, Executive Officer and Clarence G. Maddox II, Administrative Assistant report that the clerk of the Superior Court has been sued twice under 42 U.S.C. §1983 since 1982. The case alleging the wrongful dismissal of a suit was dismissed and the claim for wrongful seizure, arrest and detention was settled for $100. Two other cases involved unsuccessful claims against judges on the Superior Court (for personal harassment and depreciation of professional livelihood) and the Executive Officer and the Joint Committee on Judicial Administration (employees' salary dispute).

FLORIDA

Respondent Randall Reder provided summary descriptions of 34 cases filed against judges, described as "civil rights actions." Seven are described as "final" dispositions; 27 as pending.

GEORGIA

Respondents Kathryn Allen, Assistant Attorney General and Chief Justice Harold N. Hill, Jr. qualify their response by noting that the Attorney General's office represents only appellate and some of the superior court judges. This summary of cases does not include actions filed against other members of the judiciary (state court judges, probate judges, juvenile court judges, justices of the peace, magistrates, and respective court personnel). In addition, the records were not computerized until January 1, 1983; in the respondent's opinion, some cases may have been missed.

In none of the 44 reported cases, has there been a judgment adverse to judicial defendants. Cases of particular interest include several unsuccessful actions brought by disgruntled litigants alleging judicial rudeness, judicial bias, improper handling of habeas corpus claims (designated as §1983 cases), mishandling of several domestic suits, improper statements to press by judge, improper publication of grand jury presentments, mishandling of a tax case, improper handling of pro se suits, deprivation of property, and mishandling of several criminal trials.

Of particular interest are several actions for allegedly improper employment decisions regarding the assignment of justices of the peace and a court reporter. Other cases brought in regard to judges' administrative tasks include two claims concerning denials of admission to the bar, a dispute regarding the official publication of opinions and a controversy over the Code of Judicial Conduct. In the latter case, the litigant agreed to a dismissal following the adoption of a revised Canon 7 (political campaign contributions). The dismissal was without prejudice to the right to seek attorney's fees. There has been extensive litigation regarding the plaintiff's request for fees and expenses of $7,522.67, but no decision has been made yet.

There have been two awards of attorney's fees to defendants, pursuant to F.R.C.P. 11 and 42 U.S.C. §1988. In the defendant's brief in support of one of these motions, the attorneys note that the Court, in its final order, deemed the case "patently frivolous" and "outrageous" in that jurors were required to answer questions regarding their verdict and a judge (with more than 50 years experience) was sued for judicial conduct at trial. The brief further describes litigants as having embarked on a career of pro se litigation. They attach as exhibits, testimony regarding the numerous suits filed.

GUAM

Presiding Judge Paul J. Abbate reports that there are no cases to report at this time.

HAWAII

Matthew Goodbody, Staff Attorney at the Supreme Court, reports that not all of the 12 civil rights actions brought against Hawaii judges since 1982 have expressly relied on 42 U.S.C. §1983. He also notes that the issue of attorney's fees has not yet arisen with respect to judges because all of the §1983 actions (except one that is pending) have been dismissed. The unsuccessful claims against judicial conduct included disputed proceedings involving securities and land sale fraud, the right to jury trials, bench warrant irregularities, foreclosure and banking procedures, domestic relations matters and one claim of racial prejudice against a criminal defendant. Claims against judges in their administrative capacity included unsuccessful suits contesting the reduction of employees' life insurance policies and the racist nature of the Bar examination application.

IDAHO

Laurie A. Demko, Executive Legal Secretary, to the Administrative Director of the Courts reports on 11 cases, of which all but two appear to have been brought by disgruntled criminal defendants or civil litigants who contested the authority and jurisdiction of the law enforcement and judicial officers they dealt with. The other two cases involved disputes concerning the alleged incarceration of juveniles with adult inmates and the unconstitutionality of the Bar's residency requirement. None of these claims have been successful, six are still pending.

ILLINOIS

James G. Woodward, Staff Attorney, Administrative Office of the Illinois Courts, and Robert E. Wagner and William I. Sullivan, Assistant Attorneys General report that none of the 27 reported cases have resulted in favorable judgments for plaintiffs. Of particular interest, are several claims alleging bribery of a judge by the CIA and other law enforcement agencies, improper trial conduct, delayed decisions, overly expedited hearings, untruths in written opinions, and attempts to reverse adverse money judgments. Also a claim has been brought alleging that a judge did not advise of the right to counsel in civil contempt cases.

One case apparently contests a judge's decision to sentence defendants to a particular driving clinic. Disputes arising from administrative decisions included claims for damages for terminating a court administrator, a probation officer, and failure to consider a judicial applicant once she had been evaluated as "not qualified" by the Bar.

Mr. Wagner notes that the cases are becoming more "sophisticated" and more numerous. He feels that many judges perceive a threat to their independence.

A case filed in 1978 concerning the real estate tax assessment system is still pending. Defendants included the State Supreme Court. Plaintiffs seek declaratory and injunctive relief, as well as attorney's fees.

INDIANA

Lilian G. Judson, Assistant Director of State Court Administration and Thad Perry, Deputy Attorney General report that none of the 13 reported cases have resulted in a judgment or settlement favorable to plaintiffs. All but three of these cases allege irregularities (or unfavorable rulings) in judicial proceedings, including a contempt hearing, several criminal matters, domestic disputes, and a sewer assessment. The cases alleging administrative wrongdoing involve a claim on behalf of terminated court employees alleging racial discrimination and another requesting back benefits.

Included in the statistical summary as one case is a series of litigation brought by one individual, a disbarred lawyer. The respondent reports that he has lost count of these cases but that the computer shows nine active cases.

There has been one attorney's fee award against plaintiff's counsel for bringing a frivolous case (a contested contempt citation).

IOWA

The Attorney General's Office provided information on 10 cases in summary form. None have resulted in judgment for plaintiff and all but four are still pending. Several of the cases were described as claims alleging false arrest. One involved a challenge to disbarment proceedings.

The non-§1983 cases reported include 13 actions against various judges by one litigant, challenges to the state's Debtor Examination Statute and the garnishment procedure.

KANSAS

No response was received.

KENTUCKY

The Administrative Office of the Courts provided information on 16 cases, none of which have resulted in judgment for plaintiff. (An additional 13 cases were listed but had no date or other identifying information). Ten of these 16 claims involved disputed court procedures or judicial conduct such as: an arrest and strip search for a nonincarcerable offense, improper criminal trial conduct and sentencing, and an illegal seizure of property in execution proceedings. In one of these dismissals, plaintiffs were ordered to pay the costs of the action.

There were two reported claims against the Supreme Court for their administration and regulation of the Bar, one regarding suspension of a license and the other concerning denial of admission.

LOUISIANA

Eugene J. Murret, Judicial Administrator, Judge Thomas C. Wicker, and Lisa F. Keegan, Staff Attorney and Patricia Nolly Bowers, Assistant Attorney General (both of the Department of Justice) reported on 24 cases, none of which have had outcomes favorable to plaintiffs. Cases of interest include several brought against judges for disputed criminal case decisions, as well as a claim of racial discrimination in sentencing. Administrative decisions that have been contested include several allegations of failing to provide trial transcripts and the commission of clerical errors and errors on docket sheet entries.

In one of these unsuccessful claims, attorney's fees were awarded against plaintiff.

Some cases that were brought prior to 1982 also were included and involve such controversies as mentioned above as well as an allegation of "doctoring" a transcript. In an unsuccessful case filed in 1981 for an alleged conspiracy, the defendants were awarded attorney's fees of $1,550. Also reported was a suit filed in 1980 against the Supreme Court to allow a foreign trained law student to take the Bar Exam.

MAINE

Debra E. Olken, Director of Policy and Analysis, Administrative Office of the Courts reported on 14 §1983 cases that have been brought against the judiciary since 1982. The most significant decision and the only case in which plaintiffs have prevailed is a claim against the state and the state court administrator on behalf of the Maine Association of Handicapped Persons, seeking relief to secure physical access to state courthouses. A consent decree has been entered, which outlines a timetable for compliance. Plaintiffs have requested attorney's fees of $9,647.74, which is under review by the governor.

Other filings involve claims by dissatisfied litigants, attacking judicial decisions concerning compulsory education, real property, criminal trials and sentencing, retroactive effect of reversing the states "OUI" statute, and the conduct of jury trials. Two other unsuccessful claims also have been brought concerning the State Bar's residency requirement.

MARYLAND

Assistant Attorney General, James G. Klair reported on 48 cases, 40 of which involved claims against judges (or court commissioners) in their judicial capacities. Eight cases were described as involving nonjudicial personnel only, clerks of court, registers of wills and a court reporter.

Three of the claims against judges have had favorable outcomes for plaintiffs: a successful challenge to garnishment procedures (on appeal), a successful mandamus that allowed the forwarding of an appeal, and a settlement for $200 (nuisance value) following plaintiff's violation and conviction of a contested city ordinance that required the wearing of a shirt in public parks. Attorney's fees have not been awarded in these cases.

Unsuccessful cases include challenges to judicial actions in a landlord-tenant dispute, criminal cases, the release of grand jury information, a name-change action, and foreclosure proceedings. Nonjudicial personnel have been unsuccessfully sued for such administrative activities as perfecting appeals, registering documents and preparing and providing transcripts.

MASSACHUSETTS

John F. Burke, reporting on behalf of the Administrative Office, Supreme Judicial Court described two pro se cases, as being both dismissed.

MICHIGAN

Saundra Smith, Lead Court Analyst at the State Administrative Office polled the states' judges regarding their experiences. This information (along with data from counsel for the judges in Lansing) indicates that 27 causes of action have been filed against judges since 1982. (Several of these named more than one judge). The only case with an outcome somewhat favorable to the plaintiff is an employee dispute involving allegations of sexual discrimination against approximately 40 judges in Wayne County. Despite the fact that the plaintiff failed to prevail on the Title VII claim, the prolonged litigation became increasing complex and costly. Former Judge Joseph Sullivan reports that a settlement figure was arrived at on the basis of what it would have cost the state to defend the judges, assuming they were 100% free of liability. Attorney's fees were not designated, as such, in the award amount.

About half of the cases are still pending. Among the unsuccessful claims are disputes arising from criminal adjudications and alleged lack of jurisdiction. Several of the cases cite judges on the basis of their "superintending" or administrative control over other judges and court employees.

MINNESOTA

Judith L. Rehak reports on behalf of the State Court Administrator's Office that all but one of the nine cases brought against judges since 1982 have been dismissed. One claim alleging harassment of a child is pending. The unsuccessful suits include claims made by incarcerated criminal defendants and litigants in domestic and parental disputes. It is significant that in three of these unsuccessful claims, plaintiffs cited Pulliam v. Allen as authority for their cause of action.

One case initiated in 1978, contesting the state's civil commitment proceedings, was dismissed against the judges but resulted in a judgment and an award of attorney's fees and costs of $175,000 against the state and county. (The original request was for $309,062.14.)

MISSISSIPPI

Martin R. McLendon, Executive Assistant to the Chief Justice, reports on two cases, both of which are pending. One complaint seeks to obtain a "pay raise" for teachers by enjoining the Chancellor of the Chancery Court of Hinds County from entering orders prohibiting teachers from striking. The second suit contests the demand of a public hearing in regard to a bar disciplinary hearing. If plaintiff prevails, the respondent presumes that attorney's fees will be requested (although no request has been filed yet).

MISSOURI

Bill L. Thompson, Staff Counsel to the Clerk of the Supreme Court reports on six §1983 cases brought against judges and clerks since 1982. Four of these claims have resulted in both judgments and attorney's fee awards to plaintiffs. In a case decided prior to Pulliam, a judgment on behalf of juveniles illegally detained (without probable cause hearings) was upheld on appeal against the probation officers but not the judge/defendants. Liability for one-half of the attorney's fee award was upheld against the state.

The other three successful claims involved employee discharge cases and in each, attorney's fees were awarded. All of these cases involved clerk's office employees suing the clerk except one which involved a female hearing officer who sued a judge (and the Court) for allegedly transferring her on the basis of sex. The claim against the judge for damages of $1, punitive damages of $1,000, and attorney's fees and costs of $17,972.29 was upheld on appeal.

Another case filed in 1981, was similarly decided in favor of the discharged clerical employee.

In the case that resulted in summary judgment in favor of the Supreme Court (contested judicial disciplinary proceedings), the prevailing defendants were awarded attorney's fees.

MONTANA

No response was received.

NEBRASKA

Joseph C. Steele reports that except for one case currently pending on a writ of certiorari before the United States Supreme Court (unclear basis of action), all of the other 10 cases brought since 1982 have been dismissed. Many of these were brought by disgruntled former litigants and the basis for the actions seemed unclear, although due process was the crux of the allegations. Two unsuccessful cases alleged wrongful discharge of probation office employees and a court reporter.

NEVADA

The respondent in the Chief Justice's office indicated that they are unable to report because the only manner in which the information could be obtained was by a telephone survey of all of their judges. The office plans to implement a procedure for tracking this information in the near future.

NEW HAMPSHIRE

Bruce E. Mohl, Assistant Attorney General reported on the 29 cases filed against judges and court personnel since 1982 in summary fashion. He indicated that all of the cases except one involved adjudicative, or judicial conduct. All of these judicial capacity cases (except the three that remain pending) have been decided in favor of defendants.

The one case in which plaintiffs prevailed was a successful challenge to the Bar's residency requirement. In that case, attorney's fees were awarded to plaintiff subject to a settlement, following the judgment on the merits.

NEW JERSEY

Michael L. Park, Special Assistant to the Chief Justice reported on behalf of the Administrative Office of the Courts and the Attorney General's Office. None of the 49 cases filed since 1982 have been decided in favor of plaintiffs; however, 32 remain pending. He reports that all of the actions have been filed against judges for actions undertaken in their judicial, as opposed to administrative capacities.

NEW MEXICO

Anthony P. Marguez, Administrative Assistant, Supreme Court, reports on 11 cases, all of which remain pending except 2 dismissed in favor of the judge/defendants and one very unusual case that was settled. All of these claims involve disputes over judicial conduct or court proceedings.

The claim that was settled favorably for plaintiffs alleged sexual assault, harassment, defamation, deprivation of rights to privacy and equal protection committed by a judge against female litigants and/or court participants. Attorney's fees were awarded in the amount of $75,000, plus $8,085.27 for the fees and costs of defending against the judge's counterclaim.

NEW YORK

Richard Rifkin, Counsel to the Attorney General provided summary information in the form of a computer print-out on cases filed since 1982. He also forwarded questionnaires with more detail on some of these cases. A total of 171 §1983 cases were reportedly filed since 1982, with approximately half still pending and 82 dismissed in favor of defendants. Only two were described as "settled." Attorney's fees awards were reportedly not involved in either of these.

The pending and dismissed actions involved primarily judicial rather than administrative actions and included such claims as: causing an attorney to wait for an order to be typed; disputed contempt proceedings; allegedly "secret" hearings; false arrest and other controversies over criminal cases; denial of right to "parent" and other matrimonial and domestic relations cases; deprivation of real property; denial of name change; mail tampering and phone tapping; dissolution of a corporation; and administration of an estate. In only one of these cases involving "disgruntled litigants" were attorney's fees awarded against the plaintiff.

In one case, a pro se litigant sued under 42 U.S.C. §1983 after being prohibited from filing in state court. The prohibition came after a series of "patently frivolous" claims (not under §1983).

Administrative duties that were the subject of unsuccessful or pending suits include: a claim for open hearing in attorney disciplinary case; inadequate oversight of family court; challenge to residency requirements of Bar; prison conditions; court reporters' work assignments; a contested decision regard a lawyer's right to advertise; employee complaints; and denial of access to court's library.

Several other cases filed prior to 1982 also were described and included one claim against 20 defendants (including nine judges).

NORTH CAROLINA

Robert E. Giles, Director of Research and Planning reported that the 32 cases described may not be a comprehensive report because "often cases are filed against a number of persons, with only one or two Judicial Department officials included in the defendant group. In addition, the precise basis of many of these suits is not clear from the complaint. All of these factors indicate why it would take several days to go through several hundred case files in the Attorney General's office, which have accumulated over the past 3 1/2 years."

The reported cases include three that have been settled for a total of $18,376 (only one specifically made allowance for attorney's fees). All of these involved administrative decisions of clerks, which resulted in the claims of wrongful dismissal.

The majority (all but nine that are still pending) have been dismissed. They involved such contested judicial actions as a real property dispute (it also involved a 1st amendment claim by the Nazi Party), several criminal proceedings and prisoner complaints, and domestic relations and custody matters. Most of the administrative concerns resulted in suits against clerks, although judges were sued in one action that alleged unconstitutional jail conditions.

A §1983 case filed in 1979 also was described as challenging the state's requirement that a lawyer must first review the case of an appellant proceeding *in forma pauperis*, certifying that the trial court's action is "contrary to law." Also described were three cases brought in 1983, 1984, and 1985 respectively against clerks and judges in grounds other than §1983. A negotiated settlement is expected in one of these.

NORTH DAKOTA

Larry Spears, Assistant State Court Administrator and Kermit E. Bye, retained private counsel reported on growing litigation activity in the state. They describe the 19 cases as pro se suits, which raise strange and unclear legal ideas. "Except for the time and expense of defending against them, they appear to be frivolous cases in which no damages or attorney's fees could be awarded under any circumstances. The only exception could have been in (one), which has been terminated." In this case, plaintiff alleged abuse of power regarding visitation rights. Summary judgment was awarded to defendant.

The other unsuccessful (or pending) claims are described in the questionnaires and accompanying briefs as unclear and "totally unintelligible." They appear to be brought against all of the officials and significant participants in the plaintiff's prior experiences with the courts.

To date, Mr. Bye has had eleven of the cases dismissed and has successfully argued for attorney's fee and costs awards in four of these cases, pursuant to F.R.C.P. 11. These have ranged from $500-750 per case. Similar requests in two other cases are pending.

Cases brought pursuant to other non-§1983 grounds also were described. In one of these, Mr. Bye has successfully argued for dismissal and an award of $750 against the plaintiff for attorney's fees and costs.

OHIO

No response was received.

OKLAHOMA

No response was received.

OREGON

R. William Linden, Jr., State Court Administrator and Linda Zuckerman (also with that office) reported on six cases, two of which have resulted in outcomes favorable to plaintiffs. In the case that overturned the state's statute regarding recoupment of the cost of defending acquitted indigent defendants, judgment was awarded along with an attorney's fee award of $35,000. The other case involved a terminated court employee and was settled for $3,000, without a separate settlement for fees.

One suit against the state court administrator, court clerk, and attorney general to compel third party production of materials (for inspection and testing) was dismissed. Another contesting a judge's issuance of a bench was also dismissed. The other two suits are pending. Of interest, is a pending claim on behalf of a newspaper and 2,000,000 residents of Oregon, alleging that summary hearings authorized by ORS 136.617 held outside of the presence of the jury and the public (to determine relevance and privilege issues regarding testimony) are unconstitutional. Plaintiff also seeks "reasonable" attorney's fees under 42 U.S.C. §1988.

PENNSYLVANIA

Charles W. Johns, Chief Legal Counsel to the Court Administrator prepared a summary list of the 150 cases filed in federal court (only) under various civil rights provisions (42 U.S.C. §§1981, 1983, 1985) since 1982. He estimated that about 75 are still pending and stated that all of the cases involved judges as defendants and all but four cases involved judicial rather than administrative conduct. Three of these cases involved employee discharge situations and were settled without counsel fees being delineated. The settlements were for $3,000, 28,000 and $25,000. He expects that the fourth case in this category (concerning legality of lawyer advertising) could result in an attorney's fee award.

He highlighted several other pending cases as potentially involving fee awards ranging from $20,000 - $150,000.

He also described a landmark case in Pennsylvania, Morrison v. Ayoob U.S.W.Dt.Pa. 78-0267, 627 F.2d669 (1980), cert. denied 449 U.S. 1102 (1981), 728 F.2d 176 (1984), cert. denied _____ US. _____, which was pending on certiorari at the time Pulliam was decided, as resulting in a counsel fee award of $24,411.20.

PUERTO RICO

Domingo Perez, Special Assistant to the Administrative Director reported on three §1983 cases filed since 1982 against members of the judiciary. Claims against the judges were dismissed in two cases and one claim remains pending. This case is of interest because it is brought against a judge who allegedly, granted attorney's fees and expenses, without jurisdiction.

RHODE ISLAND

No response was received.

SOUTH CAROLINA

Chief Justice J.B. Ness and Richard B. Kale, Senior Assistant Attorney General reported only one case. The §1983 claim was brought against the Supreme Court challenging the disciplinary rule requiring disclaimer on lawyer advertisements. The case was dismissed without prejudice following withdrawal of the rule. Plaintiffs agreed not to seek attorney's fees.

Mr. Kale noted that the search for cases in their computerized index may have overlooked other litigation against judges.

SOUTH DAKOTA

Mark Geddes, State Court Administrator, reported summary information on six §1983 cases brought against judges since 1982 and indicated all but one have been dismissed.

TENNESSEE

Chief Justice Robert E. Cooper responded that no cases have been filed seeking damages from a judge in Tennessee.

TEXAS

William L. Willis forwarded information on 11 §1983 cases with §1988 requests but qualified his response by noting that there were many more §1983 suits that have not asked for attorney fees. An audit of these would have been a "sizeable undertaking" and apparently prohibitive. The summary descriptions indicated that five have been dismissed and only one of the pending cases currently involves active settlement negotiations.

UTAH

Louise S. York, Research Attorney at the Office of the Court Administrator related that the state has relatively few cases filed against judges. She reported "partial information" from the Attorney General on these cases. Six have been dismissed against the defendant judges (in one, the court reporter remains a party). One case involved a challenge to juvenile court detention policies and was settled prior to Pulliam. The consent decree involved an attorney fee award against the state for $48,000. Two other cases are pending.

VERMONT

No response was received.

VIRGIN ISLANDS

Judge Irwin Silverlight reported on one §1983 case that was filed in 1982, and subsequently dismissed. It involved contested criminal jurisdiction over the defendant, turned plaintiff.

VIRGINIA

Deputy Attorney General James T. Moore, III prepared a descriptive list of §1983 cases against judges and judicial officers handled in his office since 1982. He indicates that other than Pulliam, most of the suits have been dismissed and only a few have sought attorney's fees; 12 remain pending. (Some of the older cases have been archived and are inaccessible.) Most of these cases involved prisoner claims contesting alleged trial irregularities. Other claims cited irregular judicial conduct in several domestic disputes and a real property case. One claim sought reinstatement to a job position.

WASHINGTON

Edith M. Rice, Court Services Specialist reported that none of the cases pending against judicial officers involve 42 U.S.C. §1983. The seven cases reported involved claims brought by "disgruntled litigants" and alleged a variety of civil rights claims. None have been successful to date.

Ms. Rice notes that a newly appointed task force to be chaired by Justice William C. Goodloe will be studying this issue, beginning in August 1985.

WEST VIRGINIA

No response was received.

WISCONSIN

J. Denis Moran, Director of the State Courts forwarded information compiled by several assistant attorneys general on 11 §1983 cases filed against judicial officers since 1982. All but one of these cases (which remains pending) have been decided for defendants. The claims are primarily concerned with contested judicial activity in criminal cases. One case involving vehicle registration fee payments (brought by "posse" types using illegal money) is, of interest, but also was dismissed as "frivolous." One claim alleged a variety of civil rights violations and named 25 state officers and employees as defendants.

In two of these unsuccessful "frivolous" claims, defendants were awarded the following amounts in fees and costs: $1,7710.10; $750 plus $40 (costs) to federal defendants and $518 to state defendants.

WYOMING

Chief Justice Richard V. Thomas, reported that three judges in the state were sued in 1983 and that each case was dismissed. He noted that all occurred prior to the decision in Pulliam v. Allen "so essentially there has been no impact of that decision in Wyoming at this time . . . up to this point our state has been most fortunate with respect to the fact that we have had no impact under Pulliam v. Allen. Obviously, we cannot be assured that situation would continue indefinitely."

I. Number of 42 U.S.C. §1983 Cases Filed Against State Court Judges and Other Judicial Personnel

Summary of Findings. Table 1 displays the reported Section 1983 cases that have been filed against judges and other judicial personnel (quasi-judicial officers, such as hearing officers, justices of the peace, and magistrates, as well as clerks, administrators, sheriffs, and probation officers) since January 1982. A few respondents reported that in some of these cases, especially the *pro se* actions, the exact nature of the claim and the basis for relief was not always clearly stated in the complaint. Because these vaguely worded claims appear to allege violations of constitutional and civil rights, they were reported by the respondents and are included in this survey as implied Section 1983 cases. Some of the survey respondents also included cases that have been brought against judges and judicial system personnel under other state and federal provisions and in years prior to 1982. These cases are reported in the previous section entitled State Profiles and are not in the statistical summaries in Table 1.

The survey findings indicate that litigation under Section 1983 is increasing yearly. Between 1982 and 1983, the total number of reported filings increased from 177 to 264, or 49%. From 1983 to 1984, the filings increased 45%, from 264 to 382. Although it is too early to accurately measure the increase from 1984 to 1985, an estimate of 1985 filings can be derived by multiplying the figure for the first quarter of 1985 by four. This rough estimate of a projected 536 cases also indicates a steady increase in case filings.

Table 1. Number of 42 U.S.C. §1983 Cases Filed Against State Court Judges and Other Judicial Personnel

	1982	1983	1984	1985 (first quarter only)	Total
ALABAMA	2	1	1	1	5
ALASKA	--	1	1	1	3
AMERICAN SAMOA	--	--	--	--	--
ARIZONA	--	--	--	--	--
ARKANSAS	--	--	--	--	--
CALIFORNIA	--	6	9	7	22
COLORADO	6	17	28	5	56
CONNECTICUT	--	--	--	--	--
DELAWARE	--	2	6	--	8
DISTRICT OF COLUMBIA	1	2	1	--	4
FLORIDA	11	12	11	--	34
GEORGIA	16	7	16	5	44
GUAM	--	--	--	--	--
HAWAII	4	3	3	2	12
IDAHO	1	4	6	--	11
ILLINOIS	5	7	9	6	27
INDIANA	3	2	5	3	13
IOWA	--	--	7	3	10
KANSAS	No Response				
KENTUCKY	3	4	4	5	16
LOUISIANA	4	6	11	3	24
MAINE	1	7	4	2	14

Table 1. Number of 42 U.S.C. §1983 Cases Filed Against State Court Judges and Other Judicial Personnel (continued)

	1982	1983	1984	1985 (first quarter only)	Total
MARYLAND	4	11	18	15	48
MASSACHUSETTS	--	--	2	--	2
MICHIGAN	8	7	9	3	27
MINNESOTA	1	3	4	1	9
MISSISSIPPI			1	1	2
MISSOURI	1	3	2	--	6
MONTANA	No Response				
NEBRASKA	--	2	8	1	11
NEVADA	--	--	--	--	--
NEW HAMPSHIRE	5	13	6	5	29
NEW JERSEY	9	13	19	8	49
NEW MEXICO	2	2	5	2	11
NEW YORK	19	51	85	16	171
NORTH CAROLINA	6	7	15	4	32
NORTH DAKOTA	--	1	3	15	19
OHIO	No Response				
OKLAHOMA	No Response				
OREGON	--	1	3	2	6
PENNSYLVANIA	52	45	40	13	150
PUERTO RICO	1	1	1	--	3
RHODE ISLAND	No Response				

Table 1. Number of 42 U.S.C. §1983 Cases Filed Against State Court Judges and Other Judicial Personnel (continued)

	1982	1983	1984	1985 (first quarter only)	Total
SOUTH CAROLINA	--	--	1	--	1
SOUTH DAKOTA	1	--	5	--	6
TENNESSEE	--	--	--	--	--
TEXAS	1	5	5	--	11
UTAH	1	1	5	2	9
VERMONT	No Response				
VIRGIN ISLANDS	1	--	--	--	1
VIRGINIA	5	12	19	1	37
WASHINGTON	--	--	--	--	--
WEST VIRGINIA	No Response				
WISCONSIN	3	2	4	2	11
WYOMING	--	3	--	--	3
TOTAL	177	264	382	134	957

Legend:

-- No reported cases

II. Capacity in Which Judges are Sued: Judicial or Administrative

Summary of Findings. Chief among the concerns of the Task Force is the inquiry as to whether or not judges are more often sued for actions rising from their judicial or adjudicative roles as opposed to their administrative tasks. The cases were subtotaled, segregating for this analysis only those cases that involve claims against judges, magistrates, or hearing officers (as opposed to claims against clerks and administrators only).

The findings indicate that only 72 cases or 8% of the total cases brought against judges (including magistrates and hearing officers) involved disputes arising from administrative acts. This category was defined to include such activities as selection and termination of employees, access to the records and facilities of the court, and supervision of the bar with regard to the entrance requirements, examinations and advertising regulations. Sixty-nine percent of the total number of cases brought against judges involved disputed actions undertaken in the adjudicative or traditional judicial role. The causes of action in the remaining 23% of the cases were not described in sufficient detail in order to categorize them.

Table 2. Capacity in Which Judges are Sued: Judicial or Administrative

	Total Cases Reported	Cases with Judges, Magistrates and Hearing Officers as Defendants	SUED IN WHAT CAPACITY?		
			Judicial	Administrative	Unknown
ALABAMA	5	5	3	2	--
ALASKA	3	2	2	--	--
AM. SAMOA	--	--	--	--	--
ARIZONA	--	--	--	--	--
ARKANSAS	--	--	--	--	--
CALIFORNIA	22	22	14	3	5
COLORADO	56	55	42	10	3
CONNECTICUT	--	--	--	--	--
DELAWARE	8	8	8	--	--
D.C.	4	2	1	1	--
FLORIDA	34	33	--	--	33
GEORGIA	44	44	35	9	--
GUAM	--	--	--	--	--
HAWAII	12	12	10	2	--
IDAHO	11	11	4	2	5
ILLINOIS	27	27	26	1	--
INDIANA	13	13	10	3	--
IOWA	10	9	3	1	5
KANSAS	NR				
KENTUCKY	16	14	10	2	2
LOUISIANA	24	24	14	4	6

Table 2. Capacity in Which Judges are Sued: Judicial or Administrative (continued)

	Total Cases Reported	Cases with Judges, Magistrates and Hearing Officers as Defendants	SUED IN WHAT CAPACITY?		
			Judicial	Administrative	Unknown
MAINE	14	12	9	2	1
MARYLAND	48	40	40	--	--
MASSACHUSETTS	2	2	1	--	1
MICHIGAN	27	27	8	2	17
MINNESOTA	9	9	9	--	--
MISSISSIPPI	2	2	1	1	--
MISSOURI	6	4	2	2	--
MONTANA	NR				
NEBRASKA	11	11	9	2	--
NEVADA	--	--	--	--	--
NEW HAMPSHIRE	29	28	27	1	--
NEW JERSEY	49	49	49	--	--
NEW MEXICO	11	11	11	--	--
NEW YORK	171	171	69	9	93
N. CAROLINA	32	19	13	1	5
NORTH DAKOTA	19	18	18	--	--
OHIO	NR				
OKLAHOMA	NR				
OREGON	6	4	4	--	--
PENNSYLVANIA	150	150	146	4	--
PUERTO RICO	3	3	1	--	2
RHODE ISLAND	NR				

Table 2. Capacity in Which Judges are Sued:
Judicial or Administrative (continued)

	Total Cases Reported	Cases with Judges, Magistrates and Hearing Officers as Defendants	SUED IN WHAT CAPACITY?		
			Judicial	Administrative	Unknown
S. CAROLINA	1	1	--	1	--
SOUTH DAKOTA	6	6	--	--	6
TENNESSEE	--	--	--	--	--
TEXAS	11	11	1	1	9
UTAH	9	9	7	2	--
VERMONT	NR				
VIRGIN ISLANDS	1	1	1	--	--
VIRGINIA	37	33	17	2	14
WASHINGTON	--	--	--	--	--
W. VIRGINIA	NR				
WISCONSIN	11	11	8	2	1
WYOMING	3	3	--	--	3
TOTAL	957	916	633	72	211
PERCENTAGE OF TOTAL[1]			69%	8%	23%

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[1] These percentages are based on the total number of cases in which judges, magistrates, and hearing officers are named as defendants.

Legend:

NR No response

-- No cases reported

III. Disposition of Cases on the Merits of the Claim

Summary of Findings. In the reported cases, the majority of the known dispositions are in favor of defendants. Only 3% of the cases, or 25, involved decisions or settlements favorable to plaintiffs. Fifty-six percent of the cases, or 539, were decided in favor of defendants. A large portion of these cases, 41%, or 393, were reported as pending at the prehearing or pretrial stage.

As indicated in the State Profiles and in Table 4, 14 states reported 25 cases in which plaintiffs prevailed, either on the basis of a judgment or a settlement. Only six of these successful cases involved acts that can be characterized as judicial in nature. It is important to consider that in all but one of these cases, the litigants prevailed because the statute or procedure that the judge based the disputed decision on was successfully challenged. These five cases involved a successful challenge to garnishment procedures (Maryland); a (nuisance value) settlement regarding a contested city ordinance (Maryland); a contested state procedure relating to detention of juveniles (Missouri); a successful case based on sexual assault, harassment, etc. incidents against litigants by a judge (New Mexico); a successful challenge to the constitutionality of the state's statute that required recoupment of costs of legal defense for acquitted indigent defendants (Oregon) and the celebrated Pulliam case in which the statute relating to jailing defendants for nonjailable offenses was successfully challenged (Virginia).

Table 3. Disposition of Cases on the Merits of the Claim

	Total Cases Reported	CASE STATUS		
		Judgment or Settlement favorable to Plaintiff(s)	Dismissal or other judgment favorable to Defendant(s)	Pending (prehearing stage, awaiting trial)
ALABAMA	5	--	2	3
ALASKA	3	--	1	2
AM. SAMOA	--	--	--	--
ARIZONA	--	--	--	--
ARKANSAS	--	--	--	--
CALIFORNIA	22	--	17	5
COLORADO	56	1	37	18
CONNECTICUT	--	--	--	--
DELAWARE	8	--	7	1
D.C.	4	1	3	--
FLORIDA	34	--	7	27
GEORGIA	44	--	36	8
GUAM	--	--	--	--
HAWAII	12	--	11	1
IDAHO	11	--	5	6
ILLINOIS	27	--	19	8
INDIANA	13	--	6	7
IOWA	10	--	4	6
KANSAS	NR			
KENTUCKY	16	--	9	7

Table 3. Disposition of Cases on the Merits of the Claim

	Total Cases Reported	CASE STATUS		
		Judgment or Settlement favorable to Plaintiff(s)	Dismissal or other judgment favorable to Defendant(s)	Pending (At prehearing stage, awaiting trial)
LOUISIANA	24	--	14	10
MAINE	14	1	13	--
MARYLAND	48	3	27	18
MASSACHUSETTS	2	--	2	--
MICHIGAN	27	1	12	14
MINNESOTA	9	--	8	1
MISSISSIPPI	2	--	--	2
MISSOURI	6	4	1	1
MONTANA	NR			
NEBRASKA	11	--	10	1
NEVADA	--	--	--	--
NEW HAMPSHIRE	29	1	25	3
NEW JERSEY	49	--	17	32
NEW MEXICO	11	1	2	8
NEW YORK	171	2	82	87
NORTH CAROLINA	32	3	20	9
NORTH DAKOTA	19	--	11	8
OHIO	NR			
OKLAHOMA	NR			
OREGON	6	2	2	2

Table 3. Disposition of Cases on the Merits of the Claim

	Total Cases Reported	CASE STATUS		
		Judgment or Settlement favorable to Plaintiff(s)	Dismissal or other Judgment favorable to Defendant(s)	Pending (At prehearing stage, awaiting trial)
PENNSYLVANIA	150	3	72	75
PUERTO RICO	3	--	2	1
RHODE ISLAND	NR			
S. CAROLINA	1	--	1	--
SOUTH DAKOTA	6	--	5	1
TENNESSEE	--	--	--	--
TEXAS	11	--	5	6
UTAH	9	1	6	2
VERMONT	NR			
VIRGIN ISLANDS	1	--	1	--
VIRGINIA	37	1	24	12
WASHINGTON	--	--	--	--
W. VIRGINIA	NR			
WISCONSIN	11	--	10	1
WYOMING	3	--	3	--
TOTAL	957	25	539	393
PERCENTAGE OF TOTAL		3%	56%	41%

Legend:

NR No response

-- No reported cases

IV. Attorney Fee Awards to Plaintiff(s)

Summary of Findings. Requests for attorney fees were reportedly made in 341, or 36%, of the reported cases filed. Many respondents indicated that a failure to request reflected the pro se nature of the claim rather than a lack of interest in an award.

Successful plaintiffs were awarded attorney fees in 11 of the 25 reported cases, or 44%. Several states indicated that some cases have been settled for a lump sum without specifically designating attorney's fees. (See the descriptions of litigation in the profiles for Maryland, North Carolina, and Pennsylvania, for example.) Also several of these cases were settled for their "nuisance value." (See descriptions of cases in the District of Columbia and Michigan.)

As shown in Table 4a, the number of requests for attorney fees has increased slightly each year for the past three years. If the number of requests for the first quarter of 1985 (43) is multiplied by four, a projected increase to 172 requests would indicate a 79% increase over 1982, 76% increase over 1983, and 65% increase over 1984. This, of course, is a very rough estimate, but nevertheless an important point to consider.

Table 4. Attorney Fee Awards to Plaintiffs

	Total Cases Reported	Cases in Which Attorney Fees Requested	Cases with Outcomes Favorable to Plaintiff(s)	Cases in which Attorney Fees Awarded to Plaintiffs
ALABAMA	5	4	--	--
ALASKA	3	1	--	--
AM SAMOA	--	--	--	--
ARIZONA	--	--	--	--
ARKANSAS	--	--	--	--
CALIFORNIA	22	4	--	--
COLORADO	56	15	1	1
CONNECTICUT	--	--	--	--
DELAWARE	8	--	--	--
D.C.	4	3	1	--
FLORIDA	34	--	--	--
GEORGIA	44	15	--	--
GUAM	--	--	--	--
HAWAII	12	--	--	--
IDAHO	11	8	--	--
ILLINOIS	27	5	--	--
INDIANA	13	2	--	--
IOWA	10	--	--	--
KANSAS	NR			
KENTUCKY	16	13	--	--
LOUISIANA	24	--	--	--

Table 4. Attorney Fee Awards to Plaintiffs

	Total Cases Reported	Cases in Which Attorney Fees Requested	Cases with Outcomes Favorable to Plaintiff(s)	Cases in which Attorney Fees Awarded to Plaintiffs
MAINE	14	4	1	--
MARYLAND	48	2	3	--
MASSA.	2	--	--	--
MICHIGAN	27	27	1	--
MINNESOTA	9	2	--	--
MISSISSIPPI	2	1	--	--
MISSOURI	6	4	4	4
MONTANA	NR			
NEBRASKA	11	2	--	--
NEVADA	--	--	--	--
NEW HAMP.	29	5	1	1
NEW JERSEY	49	3	--	--
NEW MEXICO	11	2	1	1
NEW YORK	171	19	2	--
N. CAROLINA	32	12	3	1
NORTH DAKOTA	19	7	--	--
OHIO	NR			
OKLAHOMA	NR			
OREGON	6	3	2	1
PENNSYLVANIA	150	150	3	--
PUERTO RICO	3	3	--	--

Table 4. Attorney Fee Awards to Plaintiffs

	Total Cases Reported	Cases in Which Attorney Fees Requested	Cases with Outcomes Favorable to Plaintiff(s)	Cases in which Attorney Fees Awarded to Plaintiffs
RHODE ISLAND	NR			
S. CAROLINA	1	1	--	--
SOUTH DAKOTA	6	--	--	--
TENNESSEE	--	--	--	--
TEXAS	11	11	--	--
UTAH	9	1	1	1
VERMONT	NR			
VIRGIN IS.	1	--	--	--
VIRGINIA	37	8	1	1
WASHINGTON	--	--	--	--
W. VIRGINIA	NR			
WISCONSIN	11	4	--	--
WYOMING	3	--	--	--
TOTAL	957	341	25	11
PERCENTAGE OF TOTAL		36%		44%

Legend:

NR No response

-- Number of cases reported

Table 4a. Number of Requests for Attorney Fees by Year (Year in which Case Filed)

	1982	1983	1984	1985 (first quarter only)	Total Cases with Requests
ALABAMA	1	1	1	1	4
ALASKA	--	--	--	1	1
CALIFORNIA	--	2	1	1	4
COLORADO	1	5	8	1	15
DIST. OF COLUMBIA	1	2	--	--	3
GEORGIA	9	1	3	2	15
IDAHO	1	3	4	--	8
ILLINOIS	1	2	--	2	5
INDIANA	1	--	1	--	2
KENTUCKY	2	2	4	5	13
MAINE	1	1	2	--	4
MARYLAND	--	1	1	--	2
MICHIGAN	8	7	9	3	27
MINNESOTA	--	--	1	1	2
MISSISSIPPI	--	--	--	1	1
MISSOURI	1	3	--	--	4
NEBRASKA	--	1	1	--	2
NEW HAMPSHIRE	2	3	--	--	5
NEW JERSEY	--	1	2	--	3
NEW MEXICO	--	1	--	1	2
NEW YORK	8	4	6	1	19
NORTH CAROLINA	2	3	4	3	12
NORTH DAKOTA	--	1	1	5	7

Table 4a. Number of Requests for Attorney Fees by Year (Year in which Case Filed)

	1982	1983	1984	1985 (first quarter only)	Total Cases with Requests
OREGON	--	1	2	--	3
PENNSYLVANIA	52	45	40	13	150
PUERTO RICO	1	1	1	--	3
SOUTH CAROLINA	--	--	1	--	1
TEXAS	1	5	5	--	11
UTAH	1	--	--	--	1
VIRGINIA	1	1	5	1	8
WISCONSIN	1	1	1	1	4
TOTAL	96	98	104	43	341

Legend:

-- No reported cases

V. Attorney Fee Awards to Defendant(s)

Summary of Findings. Although defendants have prevailed in 539 of the reported cases, in only 15, or 3%, of these cases have attorney fees, costs or other penalties been awarded against the plaintiffs. In these cases, the frivolous nature of the claim has prompted the award either under the Civil Rights Attorney's Fee Awards Act or F.R.C.P. 11. (See, for example, the description of these cases in Georgia, North Dakota and Wisconsin.)

Table 5. Attorney Fee Awards to Defendant(s)

	Total Cases Reported	Cases with Outcomes Favorable to Defendant(s)	Cases with Attny.'s Fees, Costs or Penalties Awarded to Defendant
ALABAMA	5	2	--
ALASKA	3	1	--
AM SAMOA	--	--	--
ARIZONA	--	--	--
ARKANSAS	--	--	--
CALIFORNIA	22	17	--
COLORADO	56	37	1
CONNECTICUT	--	--	--
DELAWARE	8	7	1
D.C.	4	3	--
FLORIDA	34	7	--
GEORGIA	44	36	2
GUAM	--	--	--
HAWAII	12	11	--
IDAHO	11	5	--
ILLINOIS	27	19	--
INDIANA	13	6	1
IOWA	10	4	--
KANSAS	NR		
KENTUCKY	16	9	1

Table 5. Attorney Fee Awards to Defendant(s)

	Total Cases Reported	Cases with Outcomes Favorable to Defendant(s)	Cases with Attny.'s Fees, Costs or Penalties Awarded to Defendant
LOUISIANA	24	14	1
MAINE	14	13	--
MARYLAND	48	27	--
MASSACH.	2	2	--
MICHIGAN	27	12	--
MINNESOTA	9	8	--
MISSISSIPPI	2	--	--
MISSOURI	6	1	1
MONTANA	NR		
NEBRASKA	11	10	--
NEVADA	--	--	--
NEW HAMP.	29	25	--
NEW JERSEY	49	17	--
NEW MEXICO	11	2	--
NEW YORK	171	82	1
N. CAROLINA	32	20	--
N. DAKOTA	19	11	4
OHIO	NR		
OKLAHOMA	NR		
OREGON	6	2	--

Table 5. Attorney Fee Awards to Defendant(s)

	Total Cases Reported	Cases with Outcomes Favorable to Defendant(s)	Cases with Attny's Fees, Costs or Penalties Awarded to Defendant
PENNSYL.	150	72	--
PUERTO RICO	3	2	--
RHODE IS.	NR		
S. CAROLINA	1	1	--
S. DAKOTA	6	5	--
TENNESSEE	--	--	--
TEXAS	11	5	--
UTAH	9	6	--
VERMONT	NR		
VIRGIN IS.	1	1	--
VIRGINIA	37	24	--
WASHINGTON	--	--	--
W. VIRGINIA	NR		
WISCONSIN	11	10	2
WYOMING	3	3	--
TOTAL	957	539	15
PERCENTAGE OF TOTAL			1.5% of total or 3% of cases in which they prevailed

Conclusions

These survey results describe the increasing numbers of cases being brought against judges each year, pursuant to 42 U.S.C. §1983. It appears that the bulk of these cases are being brought by disgruntled litigants who view Section 1983 as a means of redress against judges who have ruled against their interests in previous lawsuits. It is clear from these case statistics that very few of the cases are decided (or settled) favorably to plaintiffs. Yet, in only a very few of these suits have attorney's fees and costs been awarded against the plaintiff for the "frivolous" nature of the suit.

Despite the fact that many of these suits are brought pro se, or by litigants not represented by counsel, the yearly statistics indicate a steady and slightly increasing level of requests for attorney fees. In almost all of the successful cases, "prevailing plaintiffs" have either been awarded attorney's fees or had their cases settled for a figure that takes into account and represents the costs of representation.

A final important finding is the fact that although most of the cases are brought against judges for actions committed within their judicial roles, the successful cases (with only a few exceptions) concern administrative or nonadjudicative conduct.

APPENDIX A

FIRST REPORT OF PULLIAM V. ALLEN TASK FORCE

February 13, 1985

On August 2, 1984, the Conference of Chief Justices adopted two resolutions. Resolution No. V read in part:

> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices
>
> 1. Urges the United States Congress to exempt state judges and judicial officers, acting in their judicial capacities, from assessment of attorney fees pursuant to 42 U.S.C. Sec. 1988;
>
> 2. Urges the Judicial Conference of the United States to initiate an early study of the exemption of state judges and judicial officers acting in their official capacities from the provisions of 42 U.S.C. Sec. 1988 and to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Resolution No. VI read in part:

> NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices name from its membership a Task Force to develop studies concerning the impact of Pulliam upon:
>
> 1. The traditional and historical policy reasons behind the principles of judicial independence and judicial detachment.
>
> 2. The doctrinal foundations for the principles of judicial immunity, federalism, judicial restraint, comity, and the exhaustion of remedies.
>
> 3. The judiciary through creation of a new class of litigation against them.
>
> BE IT FURTHER RESOLVED that the final report of the Task Force be brought to the attention of The Judicial Conference of the United States, The Judicial Council of each Federal Circuit, The Judicial Conference of each Federal Circuit, the State-Federal Judicial Council of each state, the American Bar Association, each state bar association, and the judicial organizations of each state; and

> BE IT FURTHER RESOLVED that pending a study and report of the Task Force, that the Judicial Conference of the United States, Judicial Council of each federal circuit, the Judicial Conference of each federal circuit, and the State-Federal Judicial Council of each state be requested to consider the problems posed by Pulliam with the goal of the development of rules or policies for the application of the principles of comity and federalism in 42 U.S.C. Secs. 1983 and 1988 actions for injunctive relief and attorney fee awards against state judges and judicial officers pursuant to Pulliam.

The committee met on Monday, February 11, 1985, and on Wednesday, February 13, 1985. The committee's recommendations follow.

I. AMENDING 42 U.S.C. 1988

A number of organizations are seeking amendments to 42 U.S.C. 1983 and 1988. These groups include: the Reagan administration, which has proposed a bill on attorney fees; the National Association of Attorneys General, which supports the administration bill; the Lawyers Conference of the Judicial Administration Division of the ABA, which advocates amendments providing broad immunity to judges; the Judicial Immunity Committee of the JAD, which supports a limited amendment of 42 U.S.C. 1988 "to exclude from its attorney fee provisions members of the judiciary acting in their judicial capacity," and other trial judges organizations, which seek broader immunity. Congressman Gekas has introduced H.R. 877, a copy of which is appended hereto.

The proposed amendments fall within two broad categories: those which exclude attorney fees claims against judges only as to actions performed in any judicial capacity; and those which exclude attorney fee claims against judges while acting in both judicial and administrative capacities. The Task Force favors amendments along the line of the latter approach.

The proposed legislation involves chief justices in a political dispute in which we have an important interest, both personally and as representatives of other judges. Various courses of action are possible. One is to push for broad immunity and "compromise down as necessary." Another is to seek only immunity from attorney fees for actions performed in a judicial capacity.

The Task Force believes that our best course of action is to provide for flexibility in this political effort, and not to restrict ourselves to the most narrow relief.

Task Force Recommendation No. 1: that the Conference of Chief Justices support legislation amending 42 U.S.C. 1988 such as H.R. 877. [Note: Consistent with Recommendation No. 1, the Task Force recommends the passage of the attached unnumbered resolution, replacing Resolution V, portions of which are quoted above.]

II. COLLECTION OF DATA

A big problem to date has been the collection of comprehensive data regarding the effect of Pulliam upon judges, both trial and appellate. Everyone present at the meeting agreed that an effective plan to obtain such information be drawn and implemented.

Task Force Recommendation No. 2: that the Conference of Chief Justices authorize the Task Force to use all reasonable means to obtain information concerning the effect of the Pulliam decision upon judges, including canvassing each state and territory represented in the Conference of Chief Justices.

III. COURT APPEARANCES

Task Force Recommendation No. 3: that the Conference of Chief Justices authorize the Task Force: a) to file amici briefs in appropriate cases as determined by the Chairman of the Task Force; and b) to expend up to $10,000 for the preparation of amici briefs in future litigation involving *Pulliam* issues.

IV. MODEL LEGISLATION

Task Force Recommendation No. 4: that the Task Force draft model judicial immunity and indemnification legislation appropriate for enactment in each state, to be considered by the Conference of Chief Justices at its summer 1985 meeting.

V. SUPPORT OF THE AMERICAN BAR ASSOCIATION

Task Force Recommendation No. 5: that the members of the Conference of Chief Justices solicit the support of the American Bar Association to the end that the ABA will lend its assistance to the amendment of 42 U.S.C. 1988 as recommended in Task Force Recommendation No. 1.

* * * * *

RESOLUTION V

SUPPORT FOR AMENDMENT OF THE CIVIL RIGHTS ATTORNEY FEES AWARDS ACT, 42 U.S.C. 1988, TO EXEMPT JUDGES FROM ASSESSMENT OF ATTORNEYS FEES IN SUITS FOR INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. 1983

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in Pulliam v. Allen (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees pursuant to the Attorney Fees Awards Act, 42 U.S.C. Sec. 1988; and

WHEREAS, adequate remedies are available within state judicial systems and the federal courts through injunctive relief without recourse to assessment of attorney fees; and

WHEREAS, the United States Congress should give further consideration to the impact of Pulliam on the judicial detachment and independence of state judges; and

WHEREAS, the United States Congress should give particular consideration to the impact of the assessment of 42 U.S.C., Sec. 1988 attorney fees on the independence of state judges and judicial officers; and

WHEREAS, the imposition of such fees against members of the judiciary strikes at the core of the entire judicial system, and

WHEREAS, the State-Federal Relations Committee and the Judicial Liability Insurance Committee of the Conference of Chief Justices have been actively involved in these issues on behalf of the Conference of Chief Justices;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices

1. Urges the United States Congress to exempt state judges and judicial officers, acting in their judicial capacities, from assessment of attorney fees pursuant to 42 U.S.C. Sec. 1988;

2. Urges the Judicial Conference of the United States to initiate an early study of the exemption of state judges and judicial officers acting in their official capacities from the provisions of 42 U.S.C. Sec. 1983 and to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Proposed by the Committee on State-Federal Relations at the Conference of Chief Justices 36th Annual Meeting at Lake Ozark, Missouri on August 2, 1984.

RESOLUTION VI

IMPLEMENTATION OF RESEARCH ABOUT THE IMPACT OF PULLIAM v. ALLEN UPON JUDICIAL INDEPENDENCE, JUDICIAL IMMUNITY, FEDERALISM, JUDICIAL RESTRAINT, COMITY, EXHAUSTION OF REMEDIES, OTHER CONSTITUTIONAL PRINCIPLES, AND POLICY CONSIDERATION ABOUT THE CREATION OF A NEW CLASS OF LITIGATION, AND THE PASSAGE OF RULES OR POLICIES FOR IMPLEMENTATION OF THE PRINCIPLES, PARTICULARLY OF COMITY AND FEDERALISM

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in Pulliam v. Allen (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees under the Civil Rights Attorney Fees Awards Act (42 U.S.C. Secs. 1983 and 1988); and

WHEREAS, state judges and judicial officers are alarmed about the impact of Pulliam on the independence of state judges and judicial officers;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices name from its membership a Task Force to develop studies concerning the impact of Pulliam upon:

1. The traditional and historical policy reasons behind the principles of judicial independence and judicial detachment.

2. The doctrinal foundations for the principles of judicial immunity, federalism, judicial restraint, comity, and the exhaustion of remedies.

3. The judiciary through creation of a new class of litigation against them.

BE IT FURTHER RESOLVED that the final report of the Task Force be brought to the attention of The Judicial Conference of the United States, The Judicial Council of each Federal Circuit, The Judicial Conference of each Federal Circuit, the State-Federal Judicial Council of each state, the American Bar Association, each state bar association, and the judicial organizations of each state; and

BE IT FURTHER RESOLVED that pending a study and report of the Task Force, that the Judicial Conference of the United States, Judicial Council of each federal circuit, the Judicial Conference of each federal circuit, and the State-Federal Judicial Council of each state be requested to consider the problems posed by Pulliam with the goal of the development of rules or policies for the application of the principles of comity and federalism in 42 U.S.C. Secs. 1983 and 1988 actions for injunctive relief and attorney fee awards against state judges and judicial officers pursuant to Pulliam.

Proposed by the Committee on State-Federal Relations at the Conference of Chief Justices 36th Annual Meeting at Lake Ozark, Missouri, on August 2, 1984.

POPE HONORS MAINE COUPLE

HON. OLYMPIA J. SNOWE

OF MAINE

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 31, 1985

• Ms. SNOWE. Mr. Speaker, a couple residing in my congressional district has received a special decree from Pope John Paul II, in honor of their extraordinary accomplishment.

John and Anna Ivanisin, of Lisbon Falls, have been married now for 74 years, and for that the Pope presented them with a decree recognizing them as the longest married Roman Catholic couple in Maine. I believe that their marriage is a testament to the endurance and vitality of human compassion, and a symbol of the steadfastness of spirit and stability that characterizes the people of the State of Maine.

I want to add my congratulations and express my respect to the Ivanisins, and include a Lewiston Daily Sun article describing their recognition after my remarks:

LONGEST-MARRIED CATHOLIC COUPLE HONORED—IVANISINS CELEBRATE 74 YEARS TOGETHER

(By Connie Footman)

LISBON FALLS.—A Lisbon Falls couple, John and Anna Ivanisin, were presented a decree from Pope John Paul II Thursday afternoon, in recognition of their distinction as the longest married Roman Catholic couple in Maine.

The Ivanisins have been married 74 years.

Making a special visit to the couple's Lisbon Falls home, Bishop Edward C. O'Leary, bishop of the Diocese of Portland, celebrated Mass and presented the couple with the decree.

The decree featured a picture of the pope and a special message to the couple, which read in part, "The Holy Father commends John and Anna Ivanisin for their love of God and their Fidelity." The presentation was made in conjunction with World Marriage Day to be observed on Feb. 10.

John Ivanisin, a native of what was then Austria-Hungary, and Anna Karkos of New Jersey were married on April 19, 1910 in Lisbon Falls. Shortly thereafter, they moved into the large two story home that John built on 29 Free St., where the couple still live today.

Both worked in the textile mill in Lisbon Falls, then known as Worumbo Manufacturing Co., until their retirement.

An avid baseball player in his youth, Ivanisin still enjoys watching baseball on television.

The couple has five children, Ann Ivanisin, Margaret Ivanisin, Mrs. Catherine Aniceti, Mrs. Marion Kazimer and John Ivanisin, seven grandchildren and 10 great-grandchildren.•

PULLIAM VERUS ALLEN

HON. GEORGE W. GEKAS

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 31, 1985

• Mr. GEKAS. Mr. Speaker, I am today introducing legislation to alleviate a problem raised by the Supreme Court's decision in *Pulliam v. Allen* (No. 82-1432). In that case, the Court by a 5-4 majority held that judicial immunity is not a bar to the award of attorney's fees under the Civil Rights Attorney's Fees Awards Act even when damages themselves would be barred or limited by immunity doctrines.

In Pulliam, a justice of the peace imposed bail on defendants charged with a nonjailable offense and incarcerated those who did not post sufficient bond, in accordance with State law. The named defendants sought and received injunctive relief against this practice and were awarded $7,691.09 in attorney's fees under 42 U.S.C. 1988. The propriety of this relief was upheld by the Supreme Court.

The threat that this decision poses to the independence of our judiciary was stated in the dissent of Justice Powell, in which the Chief Justice as well as Justices O'Connor and Rehnquist joined. Even though the majority opinion of Justice Blackman recognized and upheld judicial immunity from suits for damages, the dissent warned that the decision opens the door for those who would harass judges with vexatious actions for injunctive relief and make such actions particularly attractive with the litigatory siren song of attorney's fees.

My proposed legislation is not intended to address the broad range of abuse to which 18 U.S.C. 1988 has been subjected and which Justice Powell scored (slip opinion, p. 1213). The legislation attempts only to isolate the major problem and to alleviate it. It does not prohibit the seeking of injunctive relief under 42 U.S.C. 1983 against judges, even though Justice Powell argued that the doctrine of judicial immunity should extend to such actions. Nor on the other hand does it codify that portion of the majority opinion, preferring rather to permit subsequent Court construction on the extent of judicial immunity.

My bill simply prohibits the award of attorney's fees against judges growing out of actions for injunctive relief. As Justice Powell noted in Pulliam, there is no difference between monetary damages against a judge and making him personally liable for a plaintiff's attorney's fees. The latter is the same as the former in its effect and would make even the most conscientious judge reticent about making the difficult decisions necessary to discharge his responsibilities.

Mr. Speaker, an independent judiciary is the essence of workable Democracy and must be protected not only from the encroachments of other branches of government, but also form other forms of intimidation.•

COMMEMORATIVE COINS FOR THE SCOUTS

HON. WILLIAM E. DANNEMEYER

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 31, 1985

• Mr. DANNEMEYER. Mr. Speaker, this year, and again in 1987, this Nation celebrates two important anniversaries. The first is the 75th anniversary of the Boy Scouts of America and it is followed, just 2 years later, by the diamond jubilee of the Girl Scouts, U.S.A. If ever there were two organizations deserving of recognition for what they have contributed to this country over th years, it is these two. Since their inception in 1910 and 1912 respectively, the Boy Scouts and the Girl Scouts have provided over 133 million youngsters with an opportunity to develop, in a properly supervised setting, new skills, and added confidence. Today, over 6 million boys and girls are members of Boy Scouts and Girl Scouts and their enthusiasm speaks volumes as to the continuing relevancy of scouting.

In view of this record of accomplishment, I feel it is only appropriate that we honor these two fine organizations as they get ready to celebrate their diamond jubilees. Therefore, in association with 16 original cosponsors (Mr. ROE, Mr. HORTON, Mr. RAHALL, Mr. DWYER, Mr. LAGOMARSINO, Mr. FROST, Mr. FRENZEL, Mr. MOORHEAD, Mr. BEVILL, Mr. BRYANT, Ms. MIKULSKI, Mr. DUNCAN, Mr. SKELTON, Mr. QUILLEN, Mr. EVANS of Iowa, and Mr. REGULA), I am today reintroducing legislation, first introduced in the 98th Congress, calling for the issuance of two commemorative coins, one to mark the 75th anniversay of the Boy Scouts and the other to remember the 75th anniversary of the Girl Scouts. Both coins would be 50 cent pieces, both would be legal tender, both would be coated instead of precious metal, and up to 10 million of each could be produced and made available for purchase. The cost of the coins, to the public, would be 50 cents or the cost of production whichever was higher, a figure low enough to enable scouts themselves to purchase the coins but sufficiently high to make it unlikely there would be any long-term cost to the taxpayer.

Although there haven't been many commemorative coins in recent years—the Olympic coins and the George Washington coin are the only ones that have been produced in the last 30 years—precedents certainly exist for the coins I am recommending. In fact, commemorative coins date all the way back to 1892 and, from that date until their temporary discontinuance in the early 1950's, 68 of them were issued. Moreover, three of those coins—all 50 cent pieces—were diamond jubilee coins, the first honoring the 75th anniversary of California statehood, the

I

99TH CONGRESS
1ST SESSION

H. R. 877

To prohibit the award of attorney's fees against judges growing out of actions for injunctive relief.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1985

Mr. GEKAS introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To prohibit the award of attorney's fees against judges growing out of actions for injunctive relief.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1988 of title 42, United States Code, is hereby amended to read as follows:

"§ 1988. Proceedings in vindication of civil rights: attorney's fees

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this title, and of title 'CIVIL RIGHTS,' and of title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce as a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), except an action against a judge or other judicial officer arising out of acts done or omitted in the performance of the duties of that office, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

○

RESOLUTION XVI

Support For Amendment Of The Civil Rights Attorney Fees Awards Act, 42 U.S.C. 1988, To Exempt Judges From Assessment Of Attorneys Fees In Suits For Injunctive Relief Pursuant To 42 U.S.C. 1983

WHEREAS, the United States Supreme Court, on May 14, 1984, rendered its decision in Pulliam v. Allen (No. 82-1432) holding that judicial immunity is not a bar to injunctive relief "against a member of the judiciary acting in his judicial capacity" or to the award of attorney fees pursuant to the Attorney Fees Awards Act, 42 U.S.C. Sec. 1988; and

WHEREAS, adequate remedies are available within state judicial systems and the federal courts through injunctive relief without recourse to assessment of attorney fees; and

WHEREAS, the United States Congress should give further consideration to the impact of Pulliam on the judicial detachment and independence of state judges; and

WHEREAS, the United States Congress should give particular consideration to the impact of the assessment of 42 U.S.C., Sec. 1988 attorney fees on the independence of state judges and judicial officers; and

WHEREAS, the imposition of such fees against members of the judiciary strikes at the core of the entire judicial system; and

WHEREAS, the State-Federal Relations Committee and the Judicial Immunity Committee of the Conference of Chief Justices have been actively involved in these issues on behalf of the Conference of Chief Justices;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices:

1. Urges the United States Congress to exempt state judges and judicial officers, acting in their official capacities, from assessment of attorney fees pursuant to 42 U.S.C. Sec. 1988;

2. Urges the Judicial Conference of the United States to support efforts to amend 42 U.S.C. Sec. 1988 to exempt state judges and judicial officers, acting in their official capacities, from the assessment of attorney fees.

Adopted as proposed by the Ancillary Task Force to Prepare Report on Impact of Pulliam v. Allen at the Conference of Chief Justices Eighth Midyear Meeting in Williamsburg, Virginia on February 14, 1985.

(Replaces Resolution V, adopted August 2, 1984)

APPENDIX B

Conference of Chief Justices

PRESIDENT
W. Ward Reynoldson
Chief Justice, Supreme Court
of Iowa
State Capitol Building
Des Moines, Iowa 50319
(515) 281-5174

Secretariat
National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

March 20, 1985

Dear :

At the recent Midyear Meeting of the Conference, the Task Force to Prepare a Report on the Impact of *Pulliam* v. *Allen* met and presented its First Report. The most important recommendation in this report proposed Conference support for the enactment of legislation that would exempt state judges and judicial officers, acting in their *official* capacities, from attorney fee awards brought pursuant to 42 U.S.C. 1988. This was adopted in the form of Resolution XVI, which urges Congress to amend 42 U.S.C. 1988 and likewise, urges the Judicial Conference of the United States to support our efforts.

Since the Midyear Meeting, the Judicial Conference of the United States has approved a somewhat similar resolution, which supports the amendment of 42 U.S.C. 1988, in pertinent part, as follows:

> provided that no such fee shall be awarded against a judge or other judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made.

The Ad Hoc Committee on Judicial Immunity and Indemnity of the Judicial Administration Division of the American Bar Association recently decided to submit a recommendation to the ABA House of Delegates at the 1985 Annual Meeting that Congress be urged to amend 42 U.S.C. 1988 so as to exempt state judges and judicial officers acting in their *judicial* capacities from assessment of attorney fees under that section.

Because of the crucial importance of obtaining data to support our contentions, the Conference approved the polling of each Chief Justice, in order to determine what impact Pulliam has had, and is having, on litigation activity and case dispositions. The attached questionnaire solicits information of this nature. We recognize that it may be inconvenient to collect this data. We have been advised, however, that an absence of this type of information is the greatest obstacle to our goal of securing amendments to 42 U.S.C. 1988. In most states, the Office of the Attorney General will have the data we are requesting.

We also are developing a brief bank on these issues and ask that from those legal briefs that have been filed in these cases, you send us copies of the sections that deal with the attorney fee issue.

Your cooperation in working with your Attorney General and/or Administrative Office of the Courts in order to collect this information is appreciated. Hopefully, your efforts will demonstrate the need to amend 42 U.S.C. 1988 and thereby, ensure the independence of the judiciary. Thank you in advance for your assistance in this endeavor.

Sincerely,

Edwin J. Peterson
Chief Justice, Supreme Court of Oregon
Chairman, Task Force to Prepare
Report on the Impact of Pulliam v. Allen

QUESTIONNAIRE

LITIGATION AGAINST JUDGES AND JUDICIAL OFFICERS

The following questions seek information on the number and types of cases that have been brought against judges and other judicial personnel (serving in your jurisdiction) since January, 1982. We have selected this date because in December, 1981, you provided such information for 1981 and we now would like to measure the litigation activity since. Please provide as much information as you reasonably can.

We would like to receive your response by April 15, 1985. Please send your completed questionnaire or other correspondence to Martha M. Parrish, Staff Attorney, National Center for State Courts, 300 Newport Avenue, Williamsburg, VA 23185 (804) 253-2000 ext. 324.

* * * * * * * *

STATE ____________ INDIVIDUAL RESPONDENT ____________

ADDRESS ____________

____

TELEPHONE NUMBER ____________

1. Using a photocopy of the attached form for each case, please provide the following information on actions brought under 42 U.S.C. 1983 in state or federal court against judges and judicial officers since January, 1982.

    a. Case Caption (Include Case Number or Cite)
    b. Court in which Filed
    c. Filing Date
    d. Basis for Relief
    e. Current Status or Disposition
    f. Were Attorney Fees pursuant to 42 U.S.C. 1988 Requested? If so, What is the Current Status of the Attorney Fee Award Request? Include Size of Award.
    g. Name, Address, and Telephone Number of Attorney(s) Representing the Judge
    h. Include any Additional Relevant Information.

2. Please enclose with your response copies of the sections of the legal briefs (filed in these cases) that deal with the attorney fee issue. Include a copy of the brief's title page.

STATE ____________________

Question 1
Complete one of these forms for each case
and attach the forms to the questionnaire.

a. CASE CAPTION (INCLUDE CASE NUMBER OR CITE)

b. COURT IN WHICH FILED

c. FILING DATE

d. BASIS FOR RELIEF

e. CURRENT STATUS OR DISPOSITION

f. WERE ATTORNEY FEES, PURSUANT TO 42 U.S.C. 1988, REQUESTED?
YES __________ NO __________

IF SO, WHAT IS THE CURRENT STATUS OF ATTORNEY FEE AWARD REQUEST? INCLUDE SIZE OF AWARD.

g. NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S) REPRESENTING JUDGE

h. ON A SEPARATE SHEET, INCLUDE ANY ADDITIONAL RELEVANT INFORMATION.

National Center for State Courts

300 Newport Avenue
Williamsburg, Virginia 23187-8798
(804) 253-2000

Edward B. McConnell
President

November 11, 1988

Honorable Edwin J. Peterson
Chief Justice, Supreme Court
of Oregon
Supreme Court Building
Salem, Oregon 97310

Dear Chief Justice Peterson:

Enclosed is a copy of a draft summary report of 42 U.S.C. 1983 cases filed against judicial officers that I prepared for Harry Swegle. The draft report is based on case information reported from forty-two states and the District of Columbia. Two additional states, New Jersey and Nebraska, have responded to the survey since the preparation of the draft report. After statistical and case imformation from the computer database is reviewed for data entry errors, a final draft report will be prepared. A copy of the final draft will be forwarded to you for review and comment.

Please call if you have questions.

Sincerely,

Phillip A. Lattimore III

Phillip A. Lattimore III
Staff Associate

pc: Marilyn McCoy Roberts
Brenda Williams ✓

TO: Harry Swegle, Washington Liaison, NCSC

FR: Phillip A. Lattimore III, Staff Associate, NCSC

DT: September 28, 1988

RE: Draft Summary Report of 42 U.S.C. 1983 Litigation Against Judges Survey Results.

This memorandum is in response to your request for information on the volume of litigation filed against judges.

Survey questionnaires were mailed to each Chief Justice in mid-January 1988 requesting information on 42 U.S.C. 1983 cases filed against judges since June 1, 1986 and to update previously reported cases pending against judges. The requested response date was February 22, 1988.

Information about 1983 suits filed against judges in California was not available from the California Administrative Office of the Courts or the Attorney General's office. As a result, survey questionnaires requesting information on 42 U.S.C. 1983 cases filed against judges were mailed in April to 1,397 active judges listed on the California Judges Association membership. This same procedure was done in 1985. California judges who responded to the 1985 survey mailing were also requested to update cases they had previously reported as pending. Seventy-one judges (5%) responded to this survey.

To date, forty-two states and the District of Columbia have responded to the Pulliam v. Allen survey questionnaire. They are:

Alabama
Arizona
California
Idaho
Maine
Oklahoma
Louisiana
New Hampshire
North Dakota
Alaska
Connecticut
Delaware
Iowa
Maryland
Georgia
Michigan
New Mexico
Pennsylvania
Arkansas
Colorado
District of Columbia
Kansas
Massachusetts
Illinois
Minnesota
New York
Rhode Island

South Carolina
Virginia
Tennessee
Wyoming
Wisconsin
Indiana
Texas
Vermont
Nevada
Utah
Mississippi
Washington
North Carolina
Oregon
Kentucky
Florida

Case information from the responding forty-two states and the District of Columbia was assembled and entered into a computer database. Summary findings are below. Please note that the statistical information that was used in preparing this draft report has not been reviewed for data entry errors. Also note that eight states and four territories have not responded to the survey to date and may subsequently do so, which may alter the findings of this summary report.

Number of 42 U.S.C. 1983 Cases Filed Against State Court Judges and Other Judicial Officers

Survey findings presently indicate that litigation under section 1983 increased annually from 1982 to 1984. Between 1982 and 1983, the total number of reported cases increased from 166 to 261, or 57%. From 1983 to 1984, the filings increased 50%, from 261 to 392. Between 1984 and 1985, the number of reported cases decreased from 392 to 258, a 34% decrease. Filings increased between 1985 and 1986 by 33% (258 to 344) and by 1% between 1986 and 1987 (344 to 349). Actions filed against hearing officers, magistrates, justices of the peace, clerks, administrators, sheriffs and probations officers are included in the statistics above and in Table 1:

TABLE 1

Cases Filed Against State Judges and Judicial Officers

Year	1982	1983	1984	1985	1986	1987	Total
Case Filings	166	261	392	258	344	349	1,770

Capacity in Which Judges Are Sued

Seven percent of the cases that are brought against judges involved disputes arising from administrative acts. This category includes such activities as selection and termination of employees, access to records and facilities of the court, and supervision of the bar with regard to entrance requirements, examinations and advertising regulations. Fifty-six percent of the total number of cases brought against judges involved disputed actions undertaken in the adjudicative or traditional judicial role. Thirty-seven percent of the cases were not described in sufficient detail and are categorized as "unknown capacity."

Summary of Status of Cases

Fifty-three percent of the reported 42 U.S.C. 1983 cases that have been decided are in favor of defendants. Only two percent of the reported cases filed against judicial and nonjudicial officers involved decisions or settlements favorable to plaintiffs. Forty-five percent of the reported cases were pending at the prehearing or pretrial state. Cases that were filed within the last two years were listed as pending if no information was given about their current disposition or status.

Pennsylvania continues to be the state with the largest number of 42 U.S.C. 1983 claims filed against judges (421). According to Mr. Howland W. Abramson, Deputy Legal Counsel to the State Court Administrator, virtually all complaints filed against judges claim civil rights violations and request payment of attorney fees. While many of the cases are resolved on judicial immunity grounds, a significant number are not subject to summary dismissal (i.e. actions challenging court procedures and rules, employment practices and administrative matters). A smaller number of cases involve state statutes challenged in equity suits where the only state actors are judges.

Attorney Fee Awards to Plaintiffs

Requests for attorney fees were reportedly made in 331 or 19% of the total reported cases. Twenty-two of the 39 plaintiffs who successfully sued judges requested attorney fees. Twelve requests were granted, or 57%. Some cases were settled for a lump sum without specifically designating attorney fees.

The table below shows that the number of requests for attorney fees increased slightly each year from 1982 to 1984. However, requests for attorney fees decreased between 1985 and 1986 but increased between 1986 and 1987.

TABLE 2

Attorney Fee Requests

Year	1982	1983	1984	1985	1986	1987	Total
Atty Fee Request	43	55	81	64	41	57	331

Attorney Fee Awards to Defendants

Defendants have prevailed in 53% of the reported cases. Defendants have been awarded attorney fee costs or other penalties for the frivolous nature of the claim filed against them under the Civil Rights Attorney Fee Awards Act or Federal Rule of Civil Procedure 11 in 2% of the cases.

Justice **Peterson**. Now, so far as the current state of law around the country, I am not aware of how many States, other than the 15 that you referred to, have passed laws similar to that.

And I have no reason to disbelieve the ACLU and the NAACP, when they say that no judges had to pay any of these attorneys' fees yet, whether or not the State has such a statute.

But the fact remains that a substantial portion of the States do not have indemnification statutes yet. But more importantly, the fact remains that even in those States that do have such indemnification statutes, the effect upon the judge who is sued, is virtually the same, even if the State is going to pay the attorneys' fees.

It substantially deters the exercise of judicial independence.

Senator **Heflin**. Well, that would be particularly true in those jurisdictions where the judge is elected, would it not?

Justice **Peterson**. Yes, sir.

Senator **Heflin**. Judge Danielson, you mentioned the fact that you had received the insurance policy advertisement. Has anybody studied to determine what exceptions there are relative to the coverage that they would provide?

Judge **Danielson**. Well, Mr. Chairman, I received this about a month ago. It's a solicitation to buy insurance and I didn't buy any.

I didn't look it over terribly carefully, but as I recall there were three categories. One was defense of an action against you and another one was, of course, to indemnify you up to a certain amount.

As I recall it, I'm drawing on memory—I'd be glad to send a copy in case the committee would like to have it.

Senator **Heflin**. We would.

Judge **Danielson**. But as I recall it, it had a $250,000–$500,000 characteristic about. I suppose that's $250,000 to one plaintiff and not to exceed $500,000 for all plaintiffs in an action.

The second portion of it was defense. To provide defense for a judge who is being sued in these cases.

I would like, with your permission, Mr. Chairman, to mail that in to you. Because I just don't recall it too clearly.

Senator **Heflin**. We would like to see what type of exceptions the policies might contain.

[Material, subsequently received for the record, follows:]

GEORGE E. DANIELSON
ASSOCIATE JUSTICE

Court of Appeal
SECOND APPELLATE DISTRICT
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

March 7, 1988

Senator Howell Heflin, Chairman
Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
223 Hart Senate Office Building
Washington, D.C. 20510

Re: Judicial Immunity

Dear Senator Heflin:

When I testified before your subcommittee on Friday, February 26, 1988, you invited me to submit for the record a copy of the material which I had received offering judicial liability and legal defense insurance. A copy is attached.

In my testimony I believe that I characterized it as being a "solicitation"; that is how I remembered it at the time. More precisely, it is an offer to provide such insurance and an application for coverage.

Very truly yours,

GEORGE E. DANIELSON

GED:oh
Attch.

CEM Insurance Services

Complete Equity Markets, Inc.

Lloyd's, London Correspondents

Professional Insurance Engineers and Consultants

January 19, 1988

Hon.
Court of Appeal
2nd Appellate District
3580 Wilshire Boulevard
Room 301
Los Angeles, CA 90010

RE: JUDICIAL LIABILITY AND LEGAL DEFENSE INSURANCE

Dear Judge

Thank you for inquiring about our liability and legal defense insurance available to judges. Enclosed you will find a packet of materials which includes application for coverage.

We offer broad, full protection in Coverages A, B and C, plus the option of purchasing Coverages A and B only or Coverage C only. Please see the top yellow page of the packet for further details of coverage. The back page of the packet is the actual policy language for your review.

Please note that this insurance is sold on a "surplus-lines basis" as it is placed with non-admitted insurance carriers. (Lloyd's, London; H.S. Weaver's; St. Katherine's; and the Illinois Insurance Exchange). Therefore, a 3.1% CA surplus lines tax must be included with the annual premium. A breakdown of premium is shown on the bottom portion of the enclosed application.

If you are interested in purchasing the Judicial insurance at this time, please complete the application, indicate which coverage(s) you wish to purchase, and return it to me along with your check for the total amount applicable (including the surplus lines tax) made payable to COMPLETE EQUITY MARKETS, INC.

If you have any questions, please feel free to call me toll-free. Thank you again for considering our insurance.

Sincerely,

Gracine Huffnagle

Gracine Huffnagle
Account Executive
GH/dec
Enc.

IF IT IS INSURABLE, WE NEVER SAY NO!
1098 South Milwaukee Avenue, Suite 200 • Wheeling, Illinois 60090-6398
Toll Free 1(800) 323-6234 or in Illinois 1(312) 541-0900 • Telex # 20-6220 • FAX # 1(312) 541-0444

[illegible]

JUDICIAL LIABILITY and LEGAL DEFENSE INSURANCE

COVERAGE A - Professional and Managerial Liability

Actual legal expenses and money damages incurred as a result of a managerial or professional act made in your capacity as a judge.

COVERAGE B - Civil Rights Attorney's Fees Awards

Attorney's fees you may become legally obligated to pay as a result of a claim filed under "The Civil Rights Attorney's Fees Awards Act of 1976".

COVERAGE C - Judicial Disciplinary Proceedings

Actual legal expenses incurred as a result of defense before a governmental judicial disciplinary board.

COVERAGES A, B and C	LIMITS OF LIABILITY
A. PROFESSIONAL AND MANAGERIAL LIABILITY	$250,000/$500,000
B. INDEMNIFICATION OF ATTORNEY'S FEES	$250,000/$500,000
C. JUDICIAL DISCIPLINARY PROCEEDINGS	$15,000/$45,000
DEDUCTIBLE per claim (All other states)	$750.00
DEDUCTIBLE per claim for AK, CA, NJ, NY	$1,500.00

ANNUAL PREMIUMS

Coverages A, B and C	$860.00
Coverages A and B only	$500.00
Coverage C only	$450.00

INSTRUCTIONS

JUDICIAL LIABILITY AND LEGAL DEFENSE INSURANCE

1. Answer all questions in the application. In responding to claims, please provide all information requested (including amounts incurred or anticipated for defense or settlements) plus a photocopy of the final disposition of any claim.

2. Please make sure the application is signed and dated and that all items have been completed.

3. Premium payment plus the applicable surplus-lines tax (see table below) must be submitted with the completed application to:

   Complete Equity Markets, Inc.
   1098 South Milwaukee Avenue, 2nd Floor
   Wheeling, IL 60090

   Checks should be made payable to COMPLETE EQUITY MARKETS, INC.

If you have any questions, please contact Gracine Huffnagle of our office. The toll-free telephone number (outside Illinois only) is (800) 323-6234. Regular calling number is (312) 541-0900.

STATE SURPLUS-LINES TAXES AND FEES

AK	3.1%	HI	4.68%	MI	2%	NV	3% + $25 fee	TX	4.62%
AL	4%	IA	2%	MN	3%	NY	3.6%	UT	4.5%
AR	4%	ID	3.75%	MO	5%	OH	5%	VA	2.81
AZ	3.1%	IL	3.1%	MS	4%	OK	6	VT	3%
CA	3.1%	IN	2.5%	MT	2.75	OR	2.65%	WA	2.25%
CO	2.2%	KS	4%	NC	5%	PA	3%	WI	3%
CT	4%	KY	3%	ND	1.25%	RI	3%	WV	4%
DC	2%	LA	5%	NE	3	SC	6%	WY	3%
DE	2%	MA	4%	NH	2	SD	4		
FL	3%	MD	3%	NJ	7	TN	2.5		
GA	4%	ME	3%	NM	3				

PUERTO RICO 9%   VIRGIN ISLANDS 3%

COMPLETE EQUITY MARKETS, INC.
1098 So. Milwaukee Avenue
Wheeling, IL 60090
(312) 541-0900 or (800) 323-6234
TELEX #20-6220

JUDICIAL LIABILITY AND LEGAL DEFENSE INSURANCE
(APPLICATION FOR CLAIMS-MADE COVERAGE)

1. Name: ______________________________
(First) (Middle Initial) (Last)

2. Address: ______________________________
(Number & Street and/or Box Number) (Area Code/Phone)
____
(City) (County) (State) (Zip)

3. I am a member of the following Judges' associations: ______________________________
____
____

4. My current judicial title is: ______________________________

5. I have been a judge for __________ years.

6. I am licensed to practice law in the following states: ______________________________
____

7. I have/have not (circle one) had a complaint filed with, or judicial disciplinary proceeding initiated against me by, any entity established to investigate, review, or impose disciplinary sanctions for conduct arising from my capacity as a judge.

8. I have/have not (circle one) had a claim, lawsuit, or other legal proceeding, including any administrative proceeding, made or commenced against me arising from my capacity as a judge.

9. I personally am/am not (circle one) aware of a/any circumstance(s) which could result in a complaint being filed or a judicial disciplinary proceeding being initiated against me.

10. I personally am/am not (circle one) aware of a/any circumstance(s) which could result in a claim, lawsuit, or other legal proceeding, including any administrative proceeding, being made or commenced against me.

ATTACH COMPLETE AND SPECIFIC EXPLANATION IF ANY OF YOUR ANSWERS TO QUESTIONS 7, 8, 9 AND 10 ARE IN THE AFFIRMATIVE, INCLUDING A BREAKDOWN OF THE AMOUNTS OF ALL INCURRED AND ANTICIPATED DEFENSE COSTS, ALL PAID SETTLEMENTS, AND ALL PAID, UNSATISFIED, OR POTENTIAL JUDGMENTS AGAINST YOU.

It is understood and agreed that the insurance applied for will issue on the first day of the month following receipt of the premium and acceptance of the application by the insurer. I hereby declare that the above statements and particulars are true and that I have not suppressed or misstated any material facts and I agree that this application shall be the basis of the contract with the insurer and a copy shall be attached as a part of the policy if issued.

I wish to purchase the following coverages:

__________ Coverages A, B and C Annual premium is $860.00.
__________ Coverages A and B Annual premium is $500.00.
__________ Coverage C Annual premium is $450.00.

Total amount enclosed $ __________ *

____
(signature)

(Each application is individually rated by the insurer and thus the premium may be subject to adjustment.)

____
(date)

*PLEASE BE SURE TO INCLUDE YOUR STATE'S SURPLUS LINES TAX.

© [illegible] Complete Equity Markets, Inc. [illegible]

JUDICIAL LIABILITY AND LEGAL DEFENSE INSURANCE

SAMPLE

I. INSURING AGREEMENT

In consideration of the payment of the premium and in reliance on the statements in the application, which is made a part hereof, and subject to the limits of liability, exclusions, conditions, and other terms of this Certificate, Underwriters agree to indemnify the Assured:

COVERAGE A - PROFESSIONAL AND MANAGERIAL LIABILITY (This coverage applies only if a premium is shown therefor in the Declarations.)

For Damages which the Assured shall become legally obligated to pay for a Claim first made against the Assured during the Certificate Period arising out of a professional or managerial act taken by the Assured in the Assured's capacity as a Judge.

COVERAGE B - CIVIL RIGHTS ATTORNEY'S FEES AWARDS (This coverage applies only if a premium is shown therefor in the Declarations.)

For awards of attorney's fees under "The Civil Rights Attorney's Fees Awards Act of 1976" (Pub.L. 94-559, § 2; Title 42 U.S.C. § 1988), as it may be amended from time to time, which the Assured shall become legally obligated to pay as a result of a Claim first made against the Assured during the Certificate Period for a professional or managerial act taken by the Assured in the Assured's capacity as a Judge.

COVERAGE C - JUDICIAL DISCIPLINARY PROCEEDINGS (This coverage applies only if a premium is shown therefor in the Declarations.)

For Actual Legal Expenses incurred by the Assured as a result of a Judicial Disciplinary Proceeding first commenced against the Assured during the Certificate Period.

II. DEFINITIONS

1. "Actual Legal Expenses" means all reasonable fees and expenses billed to the Assured by a licensed attorney other than the Assured for legal services rendered in the defense of a Judicial Disciplinary Proceeding.

2. "Judicial Disciplinary Proceeding" means proceedings before the entity or entities established by constitutional provision, statute, ordinance or court rule to investigate, review, or impose disciplinary sanctions for, misconduct of the Assured in the Assured's capacity as a Judge. Such proceedings which involve two or more entities shall be considered one Judicial Disciplinary Proceeding.

3. "Claim" means a lawsuit or other legal proceeding instituted in a court of general or specific jurisdiction within the United States, or a proceeding before an administrative body or tribunal established by constitutional provision, statute, or ordinance. A Claim does not include a Judicial Disciplinary Proceeding.

4. "Costs of Defense" means the reasonable fees charged by the attorney designated by the Underwriters to defend the Assured against a Claim and all other reasonable costs and expenses resulting from the investigation, adjustment, defense and appeal of a Claim, if incurred with Underwriters' approval. Costs of Defense does not include legal fees or salary charges of the Assured, of employees of the Assured or of employees or agents of Underwriters or of any supervisory counsel retained by Underwriters.

5. "Damages" means compensatory monetary damages.

6. "Assured" means the individual Judge named in the Declarations.

7. "Judge" means a natural person appointed, elected, or hired to conduct judicial proceedings in a court within the United States possessing jurisdiction by constitutional provision, statute, ordinance, or court rule.

8. "Certificate Period" means the period of time this insurance is in effect as specified in the Declarations.

III. LIMIT OF LIABILITY

The applicable limit of liability of Underwriters for each coverage provided herein shall not exceed the amounts stated in the Declarations for Damages and Costs of Defense for "each Claim" or Actual Legal Expenses for "each Judicial Disciplinary Proceeding"; and, subject to that limit, the applicable total limit of liability of Underwriters for all the Claims made under Coverages A and B or Judicial Disciplinary Proceedings commenced under Coverage C against the Assured during the Certificate Period shall not exceed the amount stated for each coverage in the Declarations for the "Aggregate". The making of Claims or the bringing of Judicial Disciplinary Proceedings by more than one person shall not operate to increase the limit of Underwriters' liability. Two or more Claims or Judicial Disciplinary Proceedings arising out of a single event or a series of related events shall be treated as a single Claim or Judicial Disciplinary Proceeding.

The limit of liability afforded under this Certificate shall be subject to the deductible amount stated in the Declaration for each of the coverages afforded under this Certificate. The deductible amount shall be paid by the Assured and shall be applicable to loss payments and Costs of Defense, whether or not any loss payment is made. The applicable deductible amount that is due shall constitute the first monies paid as respects the settlement of any loss, the satisfaction of any judgment, or the payment of the Costs of Defense by Underwriters and Underwriters shall not be liable to pay any amount hereunder until the Assured has made full payment of said deductible amount. However, Underwriters may, at their option, pay all or part of the Assured's deductible amount and, upon notification, the Assured shall promptly reimburse Underwriters for the deductible amount paid by Underwriters.

IV. DEFENSE (Coverages A and B)

Underwriters shall defend any Claim against the Assured seeking Damages under Coverage A or B, even if any of the allegations of the Claim are groundless, false, or fraudulent, but Underwriters shall not be obligated to defend any Claim after the applicable limit of Underwriters' liability has been exhausted by payment of judgments, settlements or Costs of Defense or if payment of said applicable limit has been tendered. Costs of Defense incurred by Underwriters under Coverage A or B reduce the respective limits of liability under said coverages.

V. EXCLUSIONS

This insurance shall not apply

1. With respect to Coverages A, B and C, to any Claim or Judicial Disciplinary Proceeding:
    - a. Arising from any circumstances, incident or act required to be disclosed in the Assured's application for this insurance;
    - b. For any dishonest, fraudulent, criminal or intentionally wrongful act or omission of the Assured;
    - c. For damages sustained by any person which are directly or indirectly related to the employment, termination, retention, or refusal to employ such person by the Assured.
2. With respect to Coverages A and B, to any Claim:
    - a. Involving criminal prosecution. Criminal prosecution means any federal or state government action for enforcement of criminal laws, including offenses, conviction for which would result in a fine and/or imprisonment;
    - b. For punitive or exemplary damages, fines or penalties, except that if a Claim is brought against the Assured falling within Coverage A or B, seeking both compensatory and punitive or exemplary damages, or fines or penalties, Underwriters will defend such Claim but Underwriters shall not be liable for such punitive or exemplary damages, fines or penalties;
    - c. In respect of any loss payments or Costs of Defense directly or indirectly brought about by, arising out of, or attributable to any actual or alleged violation by the Assured of the Racketeer Influenced and Corrupt Organizations Act, 18 USC Section 1961 et seq., and any amendments thereto, or any rules or regulations promulgated thereunder.
3. With respect to Coverage A, to any Claim under Coverage B, including Claims for which the applicable limits of liability under Coverage B have been exhausted.

VI. CONDITIONS

1. Coverage C.
    - a. Selection of Attorney. The selection of an attorney to represent the Assured in a Judicial Disciplinary Proceeding shall be made by the Assured subject to approval by Underwriters prior to the incurrence of any Actual Legal Expense.
    - b. Payment of Actual Legal Expenses. The Assured shall forward to Underwriters an itemized statement from the attorney selected by the Assured pursuant to Condition 1a which sets forth the Actual Legal Expenses incurred on the Assured's behalf. After such statement is approved by Underwriters, Underwriters shall pay an amount equal to the statement to the Assured subject to the maximum limits and deductibles in the Declarations.
2. Coverages A, B and C.
    - a. Assured's Cooperation. The Assured shall cooperate with Underwriters and their representatives and upon their request shall supply information including, but not limited to, a written statement of the facts and circumstances of the Claim or Judicial Disciplinary Proceeding, and shall submit to examination and interrogation by Underwriters' representative, under oath if required, and shall attend all hearings, depositions and trials and assist in effecting settlements, securing and giving evidence and obtaining the attendance and statements of witnesses and in the conduct of suits and proceedings, all without charge to Underwriters.
    - b. Notification to Underwriters. The Assured shall as a condition precedent to the right to be indemnified or defended under this insurance give immediate notice in writing to the party designated to receive notices in the Declarations, which shall be considered notice to Underwriters,
        - i) of a Claim or Judicial Disciplinary Proceeding against the Assured by forwarding a copy of such notice, suit papers or any other documentation relating to the notice,
        - ii) of any incidents or circumstances likely to give rise to a Claim or Judicial Disciplinary Proceeding under this insurance,

      and shall, upon request, give to Underwriters such information as Underwriters may reasonably require.
    - c. Discovery Clause. If, during the Certificate Period or any Optional Claims Reporting Period purchased hereunder, the Assured shall first become aware of any incident, act, error or omission occurring before the applicable termination or expiration date of this Certificate which may subsequently give rise to a Claim or Judicial Disciplinary Proceeding and shall, during the Certificate Period or any Optional Claims Reporting Period purchased hereunder, give written notice to Underwriters of such incident, act, error or omission, then any such Claim which is subsequently made or such Judicial Disciplinary Proceeding which is subsequently instituted against the Assured arising out of such incident, act, error or omission shall for the purpose of this insurance be deemed to have been made or instituted during the Certificate Period.
    - d. Settlement. Underwriters shall not settle any Claim under Coverage A or B without the consent of the Assured. If Underwriters recommend settlement of a Claim under Coverage A or B and the Assured refuses to consent and elects to continue to defend said Claim, Underwriters' liability for the Claim shall not exceed the amount for which the Claim could have been settled in accordance with Underwriters' recommendation plus the Costs of Defense incurred up to the date of such refusal; and if Underwriters recommend a settlement to which the Assured refuses to consent and the total amount of Underwriters' liability pursuant to the foregoing is expended for further Costs of Defense, Underwriters shall have no further liability for the Claim or a duty to defend under this insurance for said Claim.
    - e. Other Insurance. This insurance shall be in excess of the amount of the applicable deductible stated in the Declarations and any other valid and collectible insurance available to the Assured whether such other insurance is stated to be primary, pro-rata, contributory, excess, contingent or otherwise, unless such other insurance is written only as a specific excess insurance over the limits of liability provided in the Declarations. This insurance shall also be excess of the amount of any payment for claims expenses or a Claim received from an indemnifying organization, including without limitation the Assured's governmental employer.

f. Subrogation. In the event of any Claim under this insurance, Underwriters shall be subrogated to all the Assured's rights of recovery therefor against any person, firm, corporation, organization, or governmental entity, including without limitation the Assured's employer, and the Assured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Assured shall do nothing after loss to prejudice such rights.

VII. OPTIONAL CLAIMS REPORTING PERIOD

If Underwriters cancel or refuse to renew this Certificate for reasons other than the Assured's non-payment of premium or deductible or non-compliance with the terms and conditions of this insurance, or if the Assured ceases to be a Judge, then upon payment of an additional premium calculated at 50% of the Assured's full annual premium, the Assured shall have the right to extend the Claims reporting period, subject otherwise to the terms, limits of liability, exclusions and conditions of this Certificate, to apply to Claims first made against the Assured during the six calendar months immediately following the effective date of such cancellation or non-renewal, but only for Claims resulting from an incident, act, error or omission before the termination or expiration date of this Certificate and otherwise covered under this insurance. This interval shall be hereinafter referred to as the Optional Claims Reporting Period.

The Optional Claims Reporting Period shall not be available when the Assured's license to practice law is revoked, suspended or surrendered.

The quotation of a different premium, deductible, or limit of liability for renewal does not constitute a cancellation or refusal to renew for the purpose of this provision.

As a condition precedent to the Assured's right to purchase the Optional Claims Reporting Period coverage, all premium and any deductible due from the Assured must have been paid. The Assured's right to purchase the Optional Claims Reporting Period coverage must be exercised by notice in writing not later than 30 days after the cancellation or termination date of this Certificate and must include payment of the premium for the Optional Claims Reporting Period.

At the commencement of any Optional Claims Reporting Period, the entire premium therefor shall be deemed earned, and Underwriters shall not be liable to return to the Assured any portion of the premium paid for the Optional Claims Reporting Period if the Assured terminates the Optional Claims Reporting Period before its term for any reason.

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Senator **Heflin**. Yes, sir?

Judge **Raab**. I would like to say that I attended a meeting with Judge Roth at the last American Bar Association meeting in Philadelphia and he was kind enough to invite someone to that meeting who gave an address regarding some policy that his company was selling and they come out of somewhere in New Jersey.

And that policy was in a million-dollar category for defense and indemnification and the rate they were charging was somewhere around $700 for the policy.

Justice **Peterson**. Judge Roth is in the room, Mr. Chairman, and he is quite knowledgeable about this.

Senator **Heflin**. Who did you say?

Justice **Peterson**. Judge Roth is in the room and he is listed as one of your witnesses.

Senator **Heflin**. Good. We will ask him about it.

Judge **Danielson**. Mr. Chairman, may I make comment on the injunctive relief. I feel that injunctive relief must also be provided, Mr. Chairman.

I can envision the situation in which a court—a judge has been enjoined from doing something or not doing something and then comes the judgment call.

A matter comes before him and does this fit within the proscriptions of the injunction or does it not. He's going to have to make a judgment call.

If he makes an erroneous judicial decision, and I don't care how conscientious and able he is, he now stands in risk of contempt.

And I don't think there's a judge on the bench in America who wants to be in the position where he has to stand to answer on a charge of contempt.

I don't care how considerate the court before whom he appears would be, no judge wants to face that situation. And he's going to have to if we leave this injunction provision in the law.

Senator **Heflin**. *Pulliam* involved a situation where a magistrate incarcerated two individuals for failure to make bond for offenses which, upon conviction, were nonjailable under Virginia law.

Do any of you have suggestions as to how that type of situation could be remedied? Is this an area that could involve the Canons of Ethics?

Judge **Danielson**. Well, Mr. Chairman, I don't think that it would really belong in that category. I cannot believe that Magistrate Pulliam intended or consciously realized that she was making a wrongful act of any kind.

I just can't believe that she was. I think she made an erroneous judicial decision when she put this man in jail for not posting bail, probably has lamented it ever since, because it was a terrible experience.

But a code of ethics is something that governs your conduct despite making and erroneous judicial decision.

Justice **Peterson**. Mr. Chairman, may I please suggest that had a writ of mandamus been issued by any other court directed to Magistrate Pulliam, I have little doubt that the Virginia courts would have granted prompt remedy to the defendant who was incarcerated.

And that, I suggest, would be replicated in each of our 50 States today.

Judge **Danielson**. I would like to concur on that. Justice Powell commented on that fact and said that this defendant, Allen, had available to him the remedy of habeas of corpus. He had the remedy available to him of asking a higher court to reduce the bail, eliminate the bail, to deal with the bail question and with the right to proceed to the highest court in the State. So, there were remedies available.

Within the United States Code there are a couple of sections, which I have mentioned in my statement, sections 1341 and 1342 of title 28, which use good language, as I see it, on a prerequisite to issuing an injunction.

And that is you shouldn't have injunctive relief "where a plain, speedy and efficient remedy may be had in the courts of each State."

That encompasses both legal remedies and equitable remedies and it's something that's within the language of our code at the present, has been for a long time and readily understood.

Senator **Heflin**. Thank you very much.

We have next a panel of Justice Joseph Weisberger of Rhode Island, we are delighted to see him here again, an old friend; Judge Phillip Roth of the Circuit Court of Oregon; and, Mr. Thomas A. Harnett an attorney from New York. Gentlemen, we are delighted to see you.

PANEL CONSISTING OF HON. JOSEPH R. WEISBERGER, JUSTICE, SUPREME COURT OF RHODE ISLAND; HON. PHILLIP J. ROTH, CIRCUIT COURT OF OREGON; AND THOMAS A. HARNETT, ATTORNEY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

STATEMENT OF HON. JOSEPH R. WEISBERGER

Justice **Weisberger**. Thank you, Mr. Chairman. And, again, on behalf of the American Bar Association and my colleagues, we all appreciate the opportunity to come before you on this important topic and we particularly appreciate the effort which you and your colleagues have made to bring this legislation to the fore.

In addition, we appreciate your summarization this morning, which indicated your great familiarity with the subject.

The position of the American Bar Association, which represents 340,000 lawyers in this country is simple, straightforward, and consistent.

We take the position that injunctive relief against a judge, either State or Federal, is inherently wrong. We take the position in addition that the award of attorneys' fees against a judge for an act committed within his or her judicial capacity is equally wrong.

I don't want to repeat the material that is in my written statement nor do I wish to try to repeat the authorities and precedents which are in an article which I appended to that statement.

But I would like to bring to your attention two concepts. First of all from our English heritage we have brought to this country two absolute doctrines of immunity.

One was judicial immunity and you read, Mr. Chairman, from *Bradley* v. *Fisher*, which sets forth the rationale for that immunity, the necessity that a judge not be subjected to vexatious and harassing litigation as a result of performing his or her function. The same language was used by Chief Justice Warren in *Pierson* v. *Ray*.

But in 1951, Justice Frankfurter used almost identical language when he, in *Tenney* v. *Brandhove*, took the position on the part of the Court that legislative immunity had to be absolute. That dealt with State legislators.

Legislative immunity as to the Congress comes under the speech and debate clause of the Constitution.

One can imagine, for example, the vexatious and harassing litigation that would be brought to bear upon legislators, including Congressmen and Senators, if they could be sued for voting for a bill or refusing to vote for a bill, for solving the deficit crisis in a way that might be inappropriately viewed by a prospective litigant; or, failing to solve it.

The legislator must deal with close judgment calls and, therefore, the legislator must be immune from vexatious and harassing litigation for acts performed qua legislator.

By the same token the judge, be it at the lower rung of the judiciary, such as Gladys Pulliam, a magistrate; a trial judge of general jurisdiction; or, an appellate judge.

He or she is administering the keen cutting edge of the law. Close cases, matters of enormous personal emotion, the sharpest of feelings, the greatest of suspicion of the motives of other parties involved, all of these come to the fore in a typical piece of litigation.

As the former chief justice of the Supreme Court of Alabama, these are matters of which you are acutely aware.

Now, the principal purpose of judicial immunity was not to avoid judgments so much as to avoid vexatious and harassing litigation, which can be brought against any judge at any time, whether it may be a judge of first instance or the highest court of the State.

We know that many of the highest court judges of our States have been sued for not admitting lawyers to the bar or for disciplining a lawyer who has committed misconduct and disbarring that attorney. Now, these attorneys absolutely must, fighting for their lives, take every measure that they find at their hand, including suits, even when those suits are meritless, indeed, even when such an action would not lie under section 1983.

Under the circumstances, Mr. Chairman and members of the committee, the members of the American Bar Association, who treasure judicial independence ask that you restore that measure of independence which was lost through the majority opinion in *Pulliam* v. *Allen*.

We disagree with the decision. We feel that the precedents cited by Justice Blackmun are inopposite and largely irrelevant to the position ultimately taken.

The ringing declaration of judicial immunity in Justice Powell's dissent represents our position on the matter. And we would urge you and your colleagues to restore judicial independence by restoring the judicial immunity which existed without break for four centuries, until 1984.

This we ask in the public interest, because our friends in the ACLU may be shortsighted. If judicial independence is reduced or diminished, civil rights of all persons are in danger.

Thank you, Mr. Chairman.

Senator HEFLIN. Without objection, the statement of Justice Weisberger will be placed in the record in its entirety.

[See joint statement at p. 217.]

Senator HEFLIN. Judge Roth, we would be delighted to hear from you now.

STATEMENT OF HON. PHILLIP J. ROTH

Judge Roth. Thank you, Senator Heflin, your distinguished Committee. We also greatly appreciate the opportunity of this early scheduling with respect to the legislation which has been assigned to your subcommittee.

The question has been raised about insurance. I have been Chairman of the Judicial Immunity Committee for the past 5 years for the Judicial Administration Division and for the Conference of Trial Judges.

And I've seen the development occur and as part of our effort for a stop-gap measure was to get insurance. And we selected National Union Fire Insurance Co. of Pennsylvania, after a series of hearings and very able lawyers on our committee as well as judges.

One of the gentleman next to me, Mr. Harnett—who is an expert in insurance law—and he along with a party named Tom Newman, a New York lawyer, helped assist us in drafting the policy.

The policy has been in effect now about 4 years. There are 2,105 policy holders as of February 19. Of that group, 984 are on a master policy program of Rhode Island, South Dakota, Ohio, and the District of Columbia. The remainder of the policy holders hold it individually.

The coverage is $1 million for an individual, no deductible. It covers both administrative acts, ministerial acts, executive acts, and judicial acts.

It also covers appearances before judicial fitness commission for attorneys' fees.

As of this date, there have been 714 claims brought, since the inception of the policy. In 1987 there were 245 claims. In 1986, 244 and in 1985, 185 claims.

There has been a development there as you can appreciate on percentage—how heavy judges have been under fire.

Justice Weisberger's remarks where he mentions there are 25,000 special court judges in the United States, approximately, and 6,000 general trial judges. So, where with just a limited number of policy holders percentagewise, you see the judges are under fire.

I have been a trial judge for 24 years and we trial judges are really in the trenches when the attack is made and all of us are elected judges. Now, I think it's mostly true throughout the country.

And I think any judge facing reelection or even a retention by a commission or a board is fearful of litigation. It isn't a question of indemnification. That's incidental.

The real fact, as pointed out by Chief Justice Peterson, is the fact that you become a personal litigant, that you become subject to suit, to discovery, to appearance in court or at least through all the depositions that can be imposed in that type of situation.

We feel it's intimidating. We feel it does affect our ability to sit there without being free from any consideration of what the effect of our decision is going to be.

I think if we're going to be anything as trial judges, we have to call it as we see it. We shouldn't have that thought in the back of our minds, "If I rule this way, I'm going to be enjoined, I'm going to be sued, I'm going to find myself under personal fire and I'm going to find myself subject in the campaign for reelection—that an opponent may come forth and point out that judge X or judge Y has been sued, he's cost the State of Oregon or State of X a substantial amount by his failure to decide properly."

These things are a danger which all judges face. We recognize that on judicial acts that we ought to be free. When it comes to other fields, we do not take a position.

But we feel that when we act as judges and ruling within our jurisdiction that we should be free from this intimidating factor.

I think as Justice Danielson pointed out, I prepared the amicus brief for the ABA in *Pulliam* v. *Allen*. And historically there's only one statement where the House considered that it might have some effect on the judiciary.

The Senate's debate of 42 U.S.C. 1988 was free from any consideration that this section would ever include the judges subject to liability.

And that even the remarks of both Senators Kennedy and Tunny during floor debate, who sponsored this 1976 act, claimed it would not change anything previous to the *Alyeska Pipeline* v. *Wilderness Society* decision. It would only protect the litigants as they previously were covered until that decision came down.

It was to fill only the gap which the *Alyeska* decision left. It was not directed at the judiciary as far as the legislative history of this statute goes.

Senator **Heflin**. Thank you, sir. Without objection, the statement of Judge Roth will be placed in the record in its entirety.

[See joint statement at p. 217.]

Senator **Heflin**. I see that Senator Chafee is here. Did you wish to make an introductory remark or brief word?

Senator **Chafee**. I want to thank you, Mr. Chairman. I just wanted to say how delighted I am to see a member of our State supreme court here, Justice Weisberger who has done a tremendous job in our State for so many years.

And he served in our State legislature as a State senator and was a leader there and has been on our supreme court for—I hesitate to say how many years.

Justice **Weisberger**. Just prior to the flood, Senator. [Laughter.]

Senator **Chafee**. But, in any event, I just wanted to say too, Mr. Chairman, that you've got a very very fine and knowledgeable individual here testifying on behalf of this legislation in the person of Justice Joseph Weisberger of our State supreme court. Thank you.

Senator **Heflin**. Thank you, Senator.

Mr. Harnett?

STATEMENT OF THOMAS A. HARNETT

Mr. **Harnett**. Mr. Chairman, members of the subcommittee, I'm truly pleased and privileged to appear before you today on this subject of the legislation concerning judge's immunity.

Under the restrictions of the American Bar Association, I can only address myself with regard to S. 1515.

In your introductory remarks, Senator Heflin, you clearly stated what is at issue here for judges to be at liberty to exercise their function with independence and without fear of consequences.

I will tell you as a member of the Judicial Immunity Committee of the American Bar Association, there is great fear among the trial judges concerning the results of the *Pulliam* decision.

Frankly, as a member of the bar, and at the time I was involved as an insurance company executive, I was greatly, deeply concerned with the amount and the intensity and the numerosity of this concern.

It is hard to understand why the relief that has presently been provided under *Pulliam* with regard to attorneys' fees and injunctive relief should be applied to the judiciary.

The members of the trial courts are subject to numerous controls and counterbalances. There is the right of appeal. There is the writ of mandamus, the writ of prohibition.

In any system of our Government, either in the executive, legislative, or judiciary, the one system that has the greatest degree of control appears to be the judiciary.

The rights of review that I have enumerated clearly are protective of the rights of an individual.

More importantly, the Office of Judicial Conduct in the various State courts provide a method of the review of the ethical conduct of a judge which is an appropriate way of seeing that there is performance in accordance with the law and the oath that the judge has taken.

To continue the right to bring actions for attorneys' fees or to provide attorneys' fees for various actions and for injunctive relief—will not have a healthful effect, because it imposes a burden on judges that contributes not to principle and fearless decision-making, but one of intimidation.

And I can tell you that from the activities in the American Bar it is clear that the judges do feel intimidated by the rule in *Pulliam*. Thank you for the opportunity.

Senator **Heflin**. Without objection, the statement of Mr. Thomas A. Harnett will be placed in the record in its entirety.

[The joint statement of Justice Weisberger, Judge Roth, and Mr. Harnett, along with additional material for the record, follow:]

AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

JUSTICE JOSEPH R. WEISBERGER
JUDGE PHILLIP J. ROTH
MR. THOMAS A. HARNETT

of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE SERVICES

of the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on the subject of

S. 1512, S. 1515, S. 1482
JUDICIAL IMMUNITY

FEBRUARY 26, 1988

Mr. Chairman and Members of the Subcommittee:

I am Joseph R. Weisberger, a Justice of the Supreme Court of Rhode Island, and former Chairman of the Appellate Judges Conference and the National Conference of State Trial Judges of the Judicial Administration Division of the ABA. With me today are Judge Phillip J. Roth of the Circuit Court of Oregon, Chairman of the Judicial Immunity Committee of the Judicial Administration Division, and Thomas A. Harnett, a practicing attorney in New York and a member of the Judicial Immunity Committee. We are pleased to appear before you to express the support of the Association for the judicial immunity proposals your Subcommittee is now considering. While the Association supports all three bills, we prefer S. 1515, the only one of the pending bills that fully addresses our concerns.

On behalf of the Association, I commend you, Mr. Chairman, and the members of this Subcommittee for your dedicated efforts to improve the justice system. While your efforts do not always receive the public attention they deserve, they have not gone unnoticed by our Association, the organized bar, and the bench.

The ABA is a national voluntary organization of more than 343,000 lawyers representing all aspects of the legal community -- civil practitioners, criminal defense lawyers, prosecutors, corporate counsels, government lawyers, public service attorneys, and law professors as well as judges from every level of the judicial system. Our policies therefore reflect the consensus of many points of view.

Mr. Chairman, it is ironic that as the United States concludes its 200th anniversary of constitutional government, the doctrine of judicial independence is at issue in a form not encountered for nearly 400 years. The case of Pulliam v. Allen 456 U.S. 522 (1984), may well signal the twilight of judicial independence in this federal republic. In essence, by a five to four majority the Supreme Court of the United States held that a state judicial officer could be enjoined by a federal district judge from conduct perceived to be a violation of a defendant's federal constitutional rights, and that said injunction might be accompanied by an award of counsel fees (in that case a counsel fee and costs of $43,691.09 were ultimately awarded). In spite of four centuries of unbroken precedent in support of judicial immunity from suit for an act committed within a judge's judicial capacity and not clearly in excess of jurisdiction, the highest court of this land held for the first time in 1984 that a judicial officer might be subjected to a suit for injunctive relief and that an attendant counsel fee might be awarded to the prevailing plaintiff.

The American Bar Association urges, as a matter of principle, that the statutory underpinning for this decision, 42 U.S.C. §1983 and §1988, be amended to preclude this direct threat to the independence of both the state and federal judiciary. This position was adopted by the American Bar Association House of Delegates at its meeting in 1987 in New Orleans when it overwhelmingly adopted the following resolution:

> BE IT RESOLVED, That the American Bar Association urges the Congress to amend 42 U.S.C. Sec. 1983 and 42 U.S.C. Sec. 1988 to prohibit the award of injunctive relief, unless a declaratory judgment was ignored, violated or unavailable, and/or counsel fees against any judicial officer for an act committed in his or her capacity as a judicial officer, and not clearly in excess of his or her jurisdiction.

S. 1515 now pending before this subcommittee would fully implement this ABA policy.

The modern genesis of the principle of judicial immunity may be traced to a decision rendered by Lord Justice Coke in the case of Floyd and Barker, 77 Eng. Rep. 1305 (1607), wherein that distinguished jurist held that a judge who had presided over a murder trial was immune from conspiracy charges brought against him in the Court of Star Chamber by the defendant for the judge's conduct in the original action. Lord Coke stated unequivocally that a judge or a justice of the peace could not be charged in Star Chamber or any other place for an act committed openly in court in the performance of his duty. This principle was again followed by Lord Coke in the case of Marshalsea, 77 Eng. Rep. 1027 (1610).

From that time forward in an unbroken line of decisions, judicial immunity has been respected and reinforced by state courts, Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810) aff'd, 9 Johns. 395 (N.Y. 1811), and by the Supreme Court of the United States in Randall v. Brigham, 74 U.S. (7 wall.) 523 (1868); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871), and in more recent times, Pierson v. Ray, 386 U.S. 547 (1967), and Stump v. Sparkman, 435 U.S. 439 (1978). In Pierson v. Ray, the noted exponent of civil rights, Chief Justice Earl Warren, speaking for a majority made the following comments concerning the doctrine of judicial immunity:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that judges should be at

> liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher* [at 349 50].) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation.

Chief Justice Warren declared that 42 U.S.C. §1983 did not abolish this well-settled principle of law. He referred to the fact that judicial immunity was established at common law as was legislative immunity. The continued vitality of legislative immunity was recognized and upheld in *Tenney v. Brandhove*, 341 U.S. 367 (1951).

It is, of course, true that all of the foregoing cases dealt with actions for damages and that the doctrine of judicial immunity from damage suits remains unimpaired.

However, the holding in Pulliam v. Allen, which subjects a judicial officer to a suit for injunctive relief actually may pose a greater threat to judicial independence than would an action for damages. Using the case of Pulliam v. Allen as an illustration, Justice Powell, who wrote a vigorous dissent, suggested that the specter of contempt proceedings for alleged violations of injunctive orders would inevitably inhibit fearless judicial decision-making. Even though Magistrate Pulliam did not appeal the specific injunctive relief granted in her case, it should be noted that the injunction was granted in spite of the fact that ample remedies were available in the Commonwealth of Virginia to vindicate the rights of the plaintiffs. A judge against whom an injunction is issued by another court may be largely stripped of the discretion necessary to perform his or her judicial function thereafter. This is particularly true when the injunctive relief is granted in respect to the delicate decision-making process on the setting of bail.

Approximately 95% of all litigation in the United States takes place in state courts. It is not inappropriate to suggest that state judges in the recent past have been as vigilant to protect the rights of defendants in criminal cases as have the members of the Supreme Court of the United States. Indeed, the history of the last several years has disclosed a high level of reversal of decisions by appellate courts of the states by the

United States Supreme Court, because state courts have interpreted the Constitution of the United States to give greater protection under the Bill of Rights than the United States Supreme Court was willing to bestow. See, e.g., California v. Carney, 105 S. Ct. 1066 (1985); Massachusetts v. Sheppard, 468 U.S. 981 (1984); New York v. Quarles, 467 U.S. 649 (1984); Florida v. Myers, 466 U.S. 380 (1984); Minnesota v. Murphy, 465 U.S. 420 (1984); Michigan v. Long, 463 U.S. 1032 (1983); Oregon v. Bradshaw, 462 U.S. 1039 (1983); Illinois v. Gates, 462 U.S. 213 (1983) and Texas v. Brown; 460 U.S. 730 (1983), to mention only a few. In all of the foregoing cases, the common denominator was that the highest court of the state, to pass upon the issue, had applied either the Fourth or Fifth Amendment in a manner that was more expansive in the vindication of the defendant's rights than would achieve approval under more recent interpretations of the Supreme Court of the United States.

The plain fact of the matter is that state judges have become enormously more sensitive in the field of civil rights since the Warren court began its steady advances to make the Bill of Rights applicable as a limitation upon state power. This process which began in earnest with Mapp v. Ohio, 367 U.S. 643 (1961) and continued unabated through the 1960s and 1970s, has caused a generation of state judges to be as perceptive and well-informed in respect to the issues underlying the First, Fourth, Fifth, and

Sixth Amendment rights as are the members of the federal judiciary. This does not mean that state judges cannot be wrong in the implementation of civil rights. The constant evolution of interpretation of rights not only relating to criminal defendants, but the First Amendment rights of newspaper publishers, attorney advertisers, and student newspapers, requires constant reevaluation of former underlying concepts. It is the opinion of experienced observers that state judges in general are doing their best to comply with the mandates of the Supreme Court of the United States. In some instances, their enthusiasm may have outrun that of some members of the Supreme Court itself.

There are in the United States approximately 6,000 state trial judges of general jurisdiction. There are approximately 25,000 state judges of limited jurisdiction. We recognize that not all of these state judicial officers will be correct in constitutional interpretation all the time. The far smaller federal judiciary consists of 575 district judges, 168 circuit judges and 9 Supreme Court justices. It is equally correct to suggest that not all members of the federal judiciary will be correct in constitutional and statutory adjudication all the time. Indeed, the numbers of plurality opinions being issued by the Supreme Court of the United States are such that it would not be presumptive to assume that if there were a level of appeal beyond that tribunal, it would be undoubtedly frequently reversed.

However, the possibility of error is not a good reason for allowing judicial officers to be corrected by injunction at the instance of a disappointed litigant. In both the federal and state judiciary there are elaborate structures of checks and balances arising out of appellate review as well as the extraordinary remedies which exist in each system including mandamus, certiorari, and prohibition.

We suggest that the potential for mischief inherent in equitable suits against state judges for real or perceived violations of civil rights far outweigh the benefit of such actions in upholding constitutional claims. You will note that S. 1515 would not disturb the remedy of declaratory relief from federal courts. We are of the opinion that such declaratory relief is more than adequate to bring about compliance with constitutional or federal statutory standards without the necessity of an injunction against a judicial officer in the first instance. Only in the unlikely event that declaratory relief from a federal court of competent jurisdiction was ignored or violated should injunctive relief be permitted.

Essentially the freedom and liberty of all citizens of the United States depend upon a strong, alert, and independent judiciary which will vindicate the rights of citizens without fear or favor. S. 1515 will preserve the fearless sense of independence which is so vital to the judicial function.

It should be remembered that any remedy which may be sought against state judicial officers under the rubric of 42 U.S.C. §1983 may also be sought against a federal judicial officer under the concept of constitutional tort, Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), as interpreted in Butz v. Economu, 438 U.S. 478 (1978). Those who advocate and exalt individual liberties must admit that those liberties have been maintained and defended most effectively by an independent state and federal judiciary. Indeed, this independent judiciary has largely been the secret weapon which has made our two centuries of ordered liberty under the Constitution of the United States a reality as opposed to an abstract theory.

On behalf of the American Bar Association, we urge this Subcommittee and the Senate of the United States to restore judicial immunity by approving S. 1515. It removes the threat of injunctions against judges, except in certain circumstances, for performance of acts within their judicial capacities and prohibits the award of attorneys fees against judges arising out of actions for injunctive relief.

As a supplement to this statement, I attach hereto an article written by me and published in the Suffolk University Law Review, Vol. XIX:537 (1985), for a detailed exposition of the case law and principles upon which judicial immunity has been based.

THE TWILIGHT OF JUDICIAL INDEPENDENCE—*PULLIAM v. ALLEN*

Joseph R. Weisberger*

Over 375 years ago, in the fifth year of the Reign of James I, Lord Justice Coke held, in *Floyd and Barker*[1], that a judge who presided over a murder trial at the Grand Session in the County of Anglessey was immune from conspiracy charges brought against him in the Court of Star Chamber by the defendant for the judge's conduct in the original action. Lord Coke, in a sweeping declaration, held that regardless of whether a defendant be convicted or acquitted,

> [Y]et the Judge, be he Judge of Assise or a justice of peace, or any other Judge, being Judge by Commission and of record and sworn to justice, cannot be charged for conspiracy, for that which he did openly in Court as Judge or justice of the peace: and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice, will do injustice.[2]

Lord Coke stated that judges are accountable only to God and the King, and do not answer to any suggestion in the Star Chamber; "for this would tend to the scandal and subversion of all justice."[3]

This ringing affirmation of judicial immunity came at a time when the notion of judicial independence was articulated for the first time even against the king himself.[4] Although Lord Coke believed the judiciary did not act under the direct supervision of the crown, King James viewed such a bold assertion with disfavor.[5] Prior to this confrontation between Coke and James I in 1610, the prevailing view espoused by the King and his most important ministers was that Judges, like other civil servants, were merely officers of the Crown.[6]

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[1] 77 Eng. Rep. 1305 (1607).

[2] *Id.* at 1306.

[3] *Id.* at 1307.

[4] It was during the reign of James I that the issuance of writs of prohibition by the common law courts was called into question as an interference with the King's prerogative. All of the judges of the common law courts were called before the King after a writ of prohibition had been issued against the Court of High Commission (an ecclesiastical court). Archbishop Bancroft argued to the King that judges were but delegates of the King and that the monarch might at any time withdraw a case from the courts and decide it himself. Coke, who was the Lord Chief Justice of the Court of King's Bench, took issue with this view and stated, "The King in his own person cannot adjudge any case either criminal . . . or betwixt party and party. The King cannot take any cause out of any courts and give judgment upon it himself . . . and the judges are sworn to execute justice according to the law and constitution of England." The King responded to this radical assertion by asking in effect, "Does this mean that I shall be under the law, which it is treason to affirm?" To this question question Coke answered with the famous phrase, "Bracton sayeth, quod Rex non debet esse sub homine, sed sub Deo et lege." The King responded with high indignation and offered to strike Coke

Consequently, when referring to the early common law method of review of judicial decisions as personal actions against judges,[7] it must be remembered that at that time, judges had not yet assumed the role which is recognizable today.[8] Indeed, even in Lord Coke's day, the judiciary had achieved a modicum of immunity and independence necessary to defeat a personal action. By the mid-Fourteenth Century, the doctrine of judicial immunity had emerged to the extent where a judge acting within his jurisdiction was not subject to personal liability for his actions.[9] Lord Edward Coke reinforced this doctrine in the cases of *Marshalsea*[10] and *Floyd and Barker*.[11] From that time forward, in an unbroken line of decisions, both English and American courts reaffirmed and respected the doctrine of judicial immunity until the United States Supreme Court's decision in *Pulliam v. Allen*.[12] This article will examine the earlier decisions and analyze the effect of *Pulliam v. Allen* on both the doctrines of judicial independence and judicial immunity.

I. THE EARLY AMERICAN CASES

Chief Justice Kent of the Supreme Court of New York, one of the most respected judges in the early development of the state judiciary, enunciated the doctrine of judicial immunity in the landmark case of *Yates v. Lansing*.[13] American courts have followed this doctrine for nearly a century and three quarters. In the original case,

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who then fell abjectly upon his knees. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 429-31 (2d ed. 1937).

[5] *See* C. BOWEN, THE LION AND THE THRONE 378-79 (1957) (discussing friction between Lord Coke and King James).

[6] 5 W. HOLDSWORTH, *supra* note 4, at 428.

[7] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 668 (2d ed. 1899).

[8] It should be noted that it was not until the Act of Settlement 12 and 13 William III (1701) that judges were given tenure independent of the King during good behavior. In fact, Coke was dismissed by James I from the Office of Chief Justice of the Court of King's Bench on November 14, 1616. 5 W. HOLDSWORTH, *supra* note 4, at 440.

[9] The doctrine seems to have been established at least during the reign of Edward III (1326-1377). 6 W. HOLDSWORTH, *supra* note 4, at 235.

[10] 77 Eng. Rep. 1027 (1610).

[11] 77 Eng. Rep. 1305 (1607).

[12] 104 S. Ct. 1970 (1984).

[13] 5 Johns. 282 (N.Y. Sup. Ct. 1810), *aff'd*, 9 Johns. 395 (N.Y. 1811).

In re Yates,[14] John Yates was arrested for malpractice and contempt, upon a writ issued by Chancellor John Lansing, Jr. Shortly after his arrest, Yates obtained a writ of habeas corpus from a justice of the Supreme Court of New York discharging him from custody. Thereafter, Chancellor Lansing ordered Yates recommitted, holding the single justice's discharge invalid. The Supreme Court of New York subsequently held the Chancellor's order of recommittal valid and the single justice's discharge invalid. On further review, a higher appellate court reversed.[15]

Yates brought an action against Lansing for recovery of a penalty authorized by statute. Lansing interposed the defense of judicial immunity. In his Supreme Court opinion, Kent cited an exhaustive list of English authorities from the yearbooks, down to the early decisions of Lord Coke, as well as more recent decisions by Lord Mansfield.[16] In his opinion, Kent concluded by stating the policy underlying judicial immunity:

> No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample on everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty.[17] This unequivocal declaration of judicial immunity as an essential buttress to judicial independence formed the basis for later American decisions.

The Supreme Court of the United States first considered the subject of judicial immunity in *Randall v. Brigham*.[18] In *Randall*, a superior court justice of the Commonwealth of Massachusetts disbarred Randall, an attorney, because of his allegedly unprofessional conduct in wrongfully retaining his client's civil war enlistment money.[19] Thereafter, Randall brought action in the Federal Circuit Court for the District of Massachusetts against the Massachusetts Superior Court judge who removed him from the bar. Mr. Justice Field affirmed the circuit court's judgment in favor of the defendant on the basis of judicial immunity. He cited English precedent, including *Floyd's and Barker's* case, as well as the more recent case of *Taaffe v. Downes.*[20] In *Taaffe*, the Irish Court of Common Pleas asserted that a diminution of judicial immunity,

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[14] 4 Johns. 317 (N.Y. Sup. Ct. 1809), *rev'd sub nom.* Yates v. People, 6 Johns. 337 (N.Y. 1810).

[15] Yates v. People, 6 Johns. 337, 338 (N.Y. 1810).

[16] Yates v. Lansing, 5 Johns. 282, 291-95 (N.Y. Sup. Ct. 1810) (discussing settled principle that judge not subject to civil suit), *aff'd*, 9 Johns. 395 (N.Y. 1811).

[17] *Id.* at 298.

[18] 74 U.S. (7 Wall.) 523 (1868).

[19] *Id.* at 526. The plaintiff, Randall, had represented one Leighton who was accused of larceny. *Id.* at 524. Leighton agreed to enlist in the navy if the prosecutor dropped the larceny charges. *Id.* Although the prosecutor never agreed to this, Randall became a surety for Leighton, who, upon his release, proceeded to Randall's office where he signed an agreement to enlist as a substitute for one Brown, of Lowell, for four hundred dollars. *Id.* This sum was retained

> [W]ould poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the Judges,—an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject.[21]

Justice Field then cited Chief Justice Kent's elaborate opinion in *Yates v. Lansing*,[22] concluding that because the superior court judge had jurisdiction to entertain the case for removal, he was protected by the doctrine of judicial immunity.[23]

Three years after the *Randall* decision, the Supreme Court of the United States decided the landmark case of *Bradley v. Fisher.*[24] This

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by Randall as indemnity for his becoming a surety on the recognizance, and also to pay the plaintiff four hundred dollars for furnishing bail. *Id.*

Leighton subsequently enlisted in the navy as a substitute for Brown, who paid the plaintiff, for enlistment, eight hundred and thirty dollars. *Id.* Of this sum, the plaintiff gave Leighton ten dollars when he boarded his assigned ship. *Id.* Although Leighton later received an additional one hundred dollars, Randall retained the balance. *Id.*

Several weeks later, Leighton wrote to the captain of his ship a letter explaining that he was promised four hundred dollars for his enlistment by his lawyer, Randall, and received only ten dollars. *Id.* at 525. The ship captain forwarded the letter to the grand jury presiding at Leighton's case. *Id.* After the letter was brought to the attention of Justice Brigham, the court summoned Randall. *Id.*

The Court concluded that Randall had taken advantage of Leighton, whereupon Randall was disbarred. *Id.* at 525-26. Randall then sued the superior court judge alleging his removal had been made arbitrarily and without lawful authority. *Id.*

[20] *Id.* at 536-37; *see* Taaffe v. Downes, 13 Eng. Rep. 15 *passim* (1813) (discussing judicial immunity).

[21] Taaffe v. Downes, 13 Eng. Rep. 15, 23-24 (1813). In *Taaffe*, the plaintiff brought an action for assault and false imprisonment against the judge who issued a writ for his arrest. *Id.* at 15. Because the judge's act was a judicial act, no suit could be brought. *Id.*

[22] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 538-39 (1868) (citing Yates v. Lansing, 5 Johns. 282 (1810)).

[23] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 539-40 (1868). The plaintiff contended that judge Brigham never had jurisdiction to disbar him because there was never a formal accusation against him nor a formal citation issued to which he could answer. *Id.* at 539. The Supreme Court rejected this, holding instead that Randall received sufficient notice and opportunity to rebut the charges against him. *Id.*

[24] 80 U.S. (13 Wall.) 335 (1871).

case evolved from a suit brought by the attorney representing the accused murderer of President Lincoln against the presiding trial judge, George B. Fisher. After the jurors failed to reach a verdict in the criminal case, the judge discharged the jury and descended from the bench. At that juncture, the judge later recited that the defense attorney, Joseph H. Bradley, accosted the judge and threatened him with personal chastisement because of the judge's conduct from the bench toward Bradley.[25] As a result, Judge Fisher issued a written order purportedly striking Bradley's name from the roll of attorneys practicing in the Supreme Court of the District of Columbia. The judge later amended the order limiting the suspension to practice in the Criminal Court of the District of Columbia. Bradley then brought an action in the Supreme Court of the District of Columbia alleging that Judge Fisher's statements were false and fraudulent, and that the order removing him from the rolls of practitioners was entered maliciously and with corrupt motivation. In addition, the declaration alleged that Judge Fisher's order was made without notice to Bradley and that he had no opportunity to dispute the charges. The trial court held that the action would not lie as a matter of law.[26]

Speaking for the Supreme Court of the United States, Justice Field again cited English authorities, as well as Chief Justice Kent, and concluded that although Judge Fisher erred in striking Bradley's name from the roll of attorneys in an ex parte fashion, his act was nevertheless a judicial act for which he was not liable to answer in damages.[27] In reaching his conclusion, Justice Field enunciated the following rationale derived from the observation of Lord Coke:

> Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in [superior courts], in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision

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[25] *See id.* at 337 (Judge Fisher sanctioned Bradley for threatening to chastise the judge in response to alleged insults directed towards Bradley).

[26] *Id.* at 340-41.

[27] *Id.* at 356-57. The Supreme Court held that the criminal court erred in not affording Bradley the opportunity to show cause why his name should not be struck from the list of practicing attorneys. *Id.* Nevertheless, Judge Fisher's act was a judicial one, making him immune from personal liability. *Id.* at 357.

> against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. . . . If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.[28] Justice Field further stated that if a judge could be compelled to answer in a civil action for his judicial acts, his office would be degraded and his usefulness destroyed.[29]

The *Bradley* Court then held that judges of a superior court of general jurisdiction have absolute immunity from civil liability for their judicial acts provided they had jurisdiction over the subject matter, although "irregularity and error attend the exercise of the jurisdiction."[30] Eventually, courts developed the rule that judges were immune from civil action for the exercise of judicial authority provided they did not act in the clear absence of jurisdiction. The example given for an act in clear absence of jurisdiction is when a probate court which has authority only over wills and settlement of estates proceeds to try parties for criminal offenses over which the jurisdiction of subject matter is entirely lacking.

II. THE EFFECT OF 42 U.S.C. SECTION 1983 UPON JUDICIAL IMMUNITY

Without question, the purpose of the Civil Rights Act of 1871 (Act), codified as 42 U.S.C. section 1983, was to provide an action in favor of persons deprived of civil rights guaranteed by the laws and Constitution of the United States by those acting under color of state law, custom, or usage.[31] The Act, however, is silent concerning

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[28] *Id.* at 348.

[29] *Id.* at 347.

[30] *Id.* at 354.

[31] 42 U.S.C. § 1983 (1982). The statute reads:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction to the deprivation

its effect upon common law immunities. In *Tenney v. Brandhove*,[32] the Supreme Court held that if Congress intended section 1983 to abolish legislative immunity it would have specifically said so.[33] It was not until 1967, in *Pierson v. Ray*,[34] that the Court specifically decided the effect of section 1983 on the doctrine of judicial immunity. In *Pierson*, a group of clergymen engaged in a "prayer pilgrimage" to promote racial integration, attempted to use a segregated waiting room in a Jackson, Mississippi bus terminal in 1961.[35] The clergymen were arrested and charged with breach of the peace in violation of a Mississippi statute which the Supreme Court of the United States subsequently found to be unconstitutional.[36] The clergymen waived a jury trial and were convicted by Judge Spencer, a judge of the Municipal Police Court. Later, after a trial de novo in the county court, one of the clergymen was acquitted by directed verdict. The prosecution then dismissed cases against the remaining clergymen.

Thereafter, the clergymen brought an action for damages against the police officers who arrested them and the judge of the Municipal Court who found them guilty in the United States District Court for the Southern District of Mississippi alleging false arrest and

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> of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[32] 341 U.S. 367 (1951).

[33] Tenney v. Brandhove, 341 U.S. 367, 376 (1951). In *Tenney*, the plaintiff alleged that a California state legislative committee instituted an investigation and eventually brought charges against him in retaliation for certain activities and beliefs expressed by him. *Id.* at 371. The plaintiff sued the legislators for $10,000 pursuant to 42 U.S.C. section 1983. *Id.* On review, the Supreme Court held that Congress did not intend the Civil Rights Act of 1871 to overturn the long established doctrine of legislative immunity. *Id.* at 376.

[34] 386 U.S. 547 (1967).

[35] *Id.* at 552. The petitioners in this case, along with other black and white clergymen, undertook a "prayer pilgrimage" from New Orleans to Detroit to promote racial harmony. *Id.* at 552. Evidence at trial established that the petitioners planned to get arrested for using segregated facilities. *Id.* In Jackson, Mississippi, the petitioners entered a white only waiting area were they were arrested by local police. *Id.* at 552-53. Petitioners were charged with violating section 2087.5 of the Mississippi Code which made it a misdemeanor to congregate in a public place under circumstances constituting a breach of the peace. *Id.* at 549.

[36] *See* Thomas v. Mississippi, 380 U.S. 524 (1965) (per curiam) (reversing state conviction of freedom riders). In *Thomas*, the Court reversed the conviction of "freedom riders" who were arrested under circumstances similar to the *Pierson* case. *See* Thomas v. State, 252 Miss. 527, 535-36, 160 So. 2d 657, 670 (1964) (Mississippi Supreme Court holds statute not void for vagueness), *rev'd*, Thomas v. Mississippi, 380 U.S. 524 (1965). Without opinion, the *Thomas* court based its reversal on the notion that such arrests violate the Interstate Commerce Act, an approach used by the Supreme Court in Boynton v. Virginia, 364 U.S. 454 (1960). The *Boynton* Court held that racial discrimination by a restaurant in a railroad station or bus terminal violates section 216(d) of the Interstate Commerce Act. *Id.* at 459.

imprisonment, and violation of their civil rights.[37] At trial, the jury returned verdicts in favor of all defendants. The Court of Appeals for the Fifth Circuit found the municipal judge immune from liability under both section 1983 and the common law for acts committed within his jurisdiction.[38] In addition, the police officers who arrested the clergymen were held to have a qualified immunity. On appeal to the Supreme Court Chief Justice Warren, speaking for the majority, stated:

> We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests or convictions other than to adjudge petitioners guilty when their cases came before the court. Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in *Bradley v. Fisher*. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences." (*Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher* [at 349-50].) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation.[39]

Chief Justice Warren further declared that section 1983 does not abolish this settled principle of law. Moreover, judicial immunity was equally well established as legislative immunity that was upheld in *Tenney v. Brandhove*.[40] Because Congress had ample opportunity to amend section 1983 and has failed to do so, it was presumed that Congress intended to uphold the validity of judicial and legislative immunity.[41]

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[37] Pierson v. Ray, 352 F.2d 213, 216-17 (5th Cir. 1965), *aff'd in part & rev'd in part*, 386 U.S. 547 (1967).

[38] *Id.* at 217.

[39] Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

[40] *See* Tenney v. Brandhove, 341 U.S. 367, 376 (per curiam) (Congress did not intend Civil Rights Act of 1871 to abrogate legislative immunity).

It should be noted that although Mr. Justice Douglas upheld the general principle of judicial immunity, he was the sole dissenter in *Pierson v. Ray*.[42] He recognized that judges should be exempt from liability for the consequences of their honest mistakes, but would have adopted the doctrine that a judge should be liable "for the knowing and intentional deprivation of a person's civil rights."[43] Justice Douglas also stated that the doctrine of judicial immunity is based on a corollary of the doctrine of sovereign immunity, namely, that the King could do no wrong.[44] This statement is highly questionable in light of the fact that none of the opinions from *Floyd and Barker* through *Bradley v. Fisher* equated the doctrine of judicial immunity with the maxim "The King can do no wrong." Every decision following Lord Coke based the doctrine on the need for judicial independence rather than the doctrine of sovereign immunity. Indeed, as previously discussed, Coke spent much of his judicial career attempting to subject the King to the law, not suggesting that he should rise above it.[45] Nevertheless, even Justice Douglas would have preserved judicial immunity save for the most outrageous conduct in which a judge knowingly and deliberately violates a person's civil rights.[46]

The next challenge to judicial immunity occurred in the case of *Stump v. Sparkman*.[47] In *Stump*, the mother of a slightly retarded fifteen year old filed an ex parte petition with an Indiana circuit court judge asking the court to order her daughter to undergo a tubal ligation. The circuit court judge granted the petition. Two years after the operation, the young woman, who was now married, discovered for the first time that she had been sterilized during the court authorized procedure. Alleging a violation of her rights under section 1983, the woman brought action in federal district court against her mother, the physicians, the hospital where the ligation had been performed, and against Judge Stump.[48] The district court dismissed the complaint on the ground that Judge Stump was the only state actor and was immune from such an action because he acted in his judicial capacity. The Court of Appeals for the Seventh Circuit reversed on the ground that Judge Stump had not acted within his jurisdiction.[49] The circuit court held that the judge forfeited his immunity because he failed to comply with elementary principles of due process.[50]

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[41] Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

[42] *Id*. at 566 (Douglas, J., dissenting). Justice Douglas believed judges who make honest mistakes should not be subject to civil liability for those reasons enumerated by the majority. *Id*. (Douglas, J., dissenting). He believed, however, that the language and legislative history of the Civil Rights Act of 1871 compelled the conclusion that Congress did not intend to exclude all judicial acts from liability. *Id*. at 561-63 (Douglas, J., dissenting). Only by subjecting the judiciary to liability could Congress guarantee the protections of the Act by ensuring judges would not impinge upon civil rights. *Id*. at 566-67 (Douglas, J., dissenting).

[43] *Id*. at 566 (Douglas, J., dissenting).

[44] *Id*. at 565 n.5 (Douglas, J., dissenting).

[45] *See supra* notes 4-6 and accompanying text (discussing conflicting views as to whether King subject to judiciary).

[46] Pierson v. Ray, 386 U.S. 547, 564 (1967) (Douglas, J., dissenting). Justice Douglas believed that preserving absolute judicial immunity would allow a judge to "vent his spleen" on particular parties or groups without fear of recourse. *Id*. (Douglas, J., dissenting). According to Justice Douglas, such a result would be monstrous and undermine the effectiveness of the Civil Rights Act of 1871. *Id*. (Douglas, J., dissenting).

[47] *See* Stump v. Sparkman, 435 U.S. 349, 364 (1978) (judges immune from liability for damages even if in error).

Speaking for the Supreme Court, Mr. Justice White reversed the circuit court's decision, holding that a trial judge of general jurisdiction in Indiana has the broadest grant of judicial authority.[51] Justice White distinguished the erroneous exercise of jurisdiction from the clear absence of jurisdiction.[52] In commenting upon judicial immunity, he observed:

> Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [,for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." [Citing] *Bradley v. Fisher*, 13 Wall., at 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit.[53]

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[48] Sparkman v. McFarlin, 552 F.2d 172, 173 (7th Cir. 1977), *rev'd*, Stump v. Sparkman, 435 U.S. 349 (1978).

[49] *Id.* at 176. Acknowledging the validity of judicial immunity, the court held that the doctrine does not protect a judge acting in clear absence of all jurisdiction. *Id.* at 174. Because Judge Stump lacked specific statutory or common law authority to sterilize the petitioner on ex parte application of the petitioner's mother, the court ruled that Judge Stump acted without jurisdiction and therefore was not protected by the doctrine of judicial immunity. *Id.* at 175-76.

[50] *Id.* at 176.

[51] Stump v. Sparkman, 435 U.S. 349, 359-60 (1978).

[52] *Id.* at 349. It may well be that the Court of Appeals for the Seventh Circuit, accustomed to looking for specific statutory authorization in order to empower federal judges to entertain an action, may have applied the same analysis erroneously to a state judge of general jurisdiction.

[53] *Id.* at 363-64.

Justices Marshall, Stewart, and Powell dissented, not on the ground of any disagreement with the general doctrine of judicial immunity, but asserted that Judge Stump's conduct did not amount to a judicial act because of his failure to observe the normal attributes of judicial process.[54]

The Court next addressed the issue of judicial immunity in *Supreme Court of Virginia v. Consumer's Union*,[55] in which a consumers' union that wished to publish a directory of lawyers, including their prevailing fees, sued the Supreme Court of Virginia for refusing to allow the advertisement of lawyer's fees. The Consumer's Union sought relief in federal court to enjoin the Supreme Court of Virginia from enforcing its ethical rule against lawyer advertising. The Supreme Court of the United States sidestepped the question of judicial immunity in reviewing the district court's injunction prohibiting the Supreme Court of Virginia from enforcing its ethical rule.[56] Justice White, again speaking for the majority, held that the promulgation and enforcement of rules governing attorneys' ethical conduct are legislative functions and, thus, judges are immune from declaratory or injunctive relief for legislative acts under *Tenney v. Brandhove*.[57] He did suggest, however, that the Virginia court would be subject to declaratory and injunctive relief, as well as the assessment of attorneys' fees in its enforcement capacity as opposed to its legislative or judicial capacity.[58]

III. THE RULE OF *PULLIAM V. ALLEN* AND ITS RAMIFICATIONS

The decision in *Pulliam v. Allen*[59] must be considered in the context of nearly four hundred years of unbroken adherence to the doctrine of judicial immunity with respect to superior court judges, and lower court judges of record provided they acted within their jurisdiction.[60]

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[54] *Id.* at 365 (Stewart, J., dissenting). The dissenters believed Judge Stump's act was not judicial because: "there was no 'case', there were no litigants, there was and could be no appeal, and there was not even the pretense of principled decision making." *Id.* at 368-69 (Stewart, J., dissenting). Because Judge Stump's decision lacked these attributes of a judicial proceeding, the dissenters felt his act was not judicial and hence he should not be afforded judicial immunity. *Id.* at 369 (Stewart, J., dissenting).

[55] 446 U.S. 719 (1980).

[56] *See id.* at 731 (issue is one of legislative immunity because act was legislative not judicial).

[57] *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (Congress did not intend to abrogate legislative immunity); *see also supra* note 33 (discussing *Tenney* case).

[58] Supreme Court of Virginia v. Consumer's Union, 446 U.S. 719, 736-37 (1980).

[59] 104 S. Ct. 1970 (1984).

[60] It should be noted, contrary to the suggestion set forth in Feinman and Cohen, *Suing*

In *Pulliam*, Gladys Pulliam, a magistrate for the county of Culpeper in the Commonwealth of Virginia, set bail for Richmond Allen and Jessie Nicholson, the plaintiffs, for nonjailable offenses which they had committed. As a result, both Allen and Nicholson were incarcerated for failure to make bond, although they were charged with offenses which carried maximum penalties of $500 and $100 fines respectively.[61] After disposition of the original cases, Allen and Nicholson sued Magistrate Pulliam pursuant to section 1983. A federal district court judge found that Magistrate Pulliam regularly required bond for nonincarcerable offenses. The judge then held such practice to be unconstitutional on both due process and equal protection grounds and enjoined Magistrate Pulliam from further actions of a similar nature.[62] The court further directed that "any pretrial detention for persons arrested for Class 3 and Class 4 misdemeanors on the grounds that the person is lawfully deemed likely to be a danger to himself or to others may last only so long as such danger persists. . . ."[63]

In addition to injunctive relief, the district court awarded the sum of $7,691.09 to the plaintiffs as costs including a counsel fee of $7,038.00 pursuant to 42 U.S.C. section 1988. Magistrate Pulliam appealed only with respect to the award of a counsel fee against her. The Court of Appeals for the Fourth Circuit determined that the magistrate was not immune from either the award of counsel fees, nor from prospective injunctive relief.[64]

On certiorari, the Supreme Court addressed the issues of whether injunctive relief might be awarded against a judicial officer and, whether incident to such relief, an award of attorney's fees might be made. The Court answered both questions in the affirmative.[65]

Judges: History and Theory, 31 S.C.L. Rev. 201, 214-16 (1980) that only superior court judges were granted such immunity, that Lord Coke in *Floyd and Barker* specifically declared that such immunity would apply to justices of the peace as well as to the judge of assise. 77 Eng. Rep. 1305, 1306-07 (1607). A justice of the peace in England then, as now, is a judicial officer of limited jurisdiction, but is a member of a court of record. It is rare for a judge in the United States now not to be a member of a court of record which is defined as "a court that is required to keep a record of its proceedings and that may fine or imprison." Black's Law Dictionary 319 (5th ed. 1979).

[61] 104 S. Ct. at 1972.

[62] Allen v. Burke, 690 F.2d 376, 377-78 (4th Cir.), *aff'd*, Pulliam v. Allen, 104 S. Ct. 1970 (1982).

[63] 104 S. Ct. at 1973 n.2.

[64] Allen v. Burke, 690 F.2d 376, 379 (4th Cir.), *aff'd*, Pulliam v. Allen, 104 S. Ct. 1970 (1982).

[65] 104 S. Ct. at 1982. The court held that Congress clearly intended attorney's fees to be available under section 1988 for costs incurred in a section 1983 action. *Id*. Although the

Mr. Justice Blackmun, writing for the majority, conceded at the outset that at common law "there was no such thing as an injunction against a judge."[66] Injunctive relief was an equitable remedy which the Chancellor could only impose against the party or parties in proceedings before other courts.[67] Justice Blackmun pointed out, however, that this limitation did not stem from judicial immunity, but rather from the substantive confines of the Chancellor's authority.

Blackmun cited the practice of the Court of King's Bench issuance of writs of prohibition to prevent ecclesiastical courts from acting outside their jurisdiction.[68] Apparently, Justice Blackmun analogized the issuance of a writ of prohibition from the Court of King's Bench to ecclesiastical or inferior courts to the granting of injunctive relief by a federal court against a state judicial officer. He conceded that "[t]he relationship between the King's Bench and inferior courts is not precisely paralleled in our system by the relationship between the state and federal courts."[69]

Although this statement by Justice Blackmun is true, it is scarcely exhaustive or descriptive. Indeed, until the *Pulliam* opinion, the relationship between state and federal courts has never been described as one of a superior court toward an inferior one. The Court of King's Bench, as well as the ecclesiastical courts, were part of a unitary judicial system.[70] In substantially every state, courts of general jurisdiction, and almost invariably the highest court of each state, are authorized to issue writs of prohibition and other prerogative writs with respect to lower courts of the same jurisdiction.[71] Although Federal Rules of Appellate Procedure provide for the issuance of writs of mandamus or prohibition with respect to lower federal courts, they also provide that a respondent judge may elect not to appear in the proceeding without conceding the issues raised in the petition.[72] In effect, the writ operates against the party in interest as opposed to the judges of the federal district court.[73]

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doctrine of judicial immunity precluded an award of damages, section 1988 mandates an award of attorney's fees. *Id.*

[66] *Id.* at 1974.

[67] *Id.* (citing 2 J. Story on Equity Jurisprudence ¶ 875, at 72 (11th ed. 1873)).

[68] 104 S. Ct. at 1976.

[69] *Id.* at 1978.

[70] *See* 3 W. Blackstone, Commentaries * 112.

[71] *See generally* 63A Am. Jur. 2d *Prohibition* § 75 (1984) (discussing constitutional and state provisions governing state court jurisdiction).

[72] Fed. R. App. P. 21(b).

[73] 104 S. Ct. at 1986 (Powell, J., dissenting).

Justice Powell vehemently disagreed with the majority and strongly asserted that:

> [T]he perceived analogy to the use of prerogative writs at English common law simply does not withstand analysis. . . . [T]he analogy rest on a peculiar practice at English common law that was occasioned by the unique relationship between the King's Bench and England's ecclesiastical courts. That relationship finds no parallel in this country. Moreover, our courts and the Federal Rules of Appellate Procedure have sought to limit the use of mandamus and prohibition for the very purpose of protecting judicial immunity. It is extraordinary, therefore, that the Court today should rely on the use of prerogative writs in England to justify exposing judicial officials in this country to harassing litigation and to subject them to personal liability for money judgments in the form of costs and attorney's fees.[74]

Justice Powell noted that both English common law cases and United States Supreme Court decisions identify the burden of harassing litigation, rather than potential pecuniary loss, as threatening judicial independence. In his dissent, Justice Powell quoted one of the justices in *Taaffe v. Downes* who illustrated the likely scenario resulting from suits for injunctive relief:

> 'If once you break down the barrier . . . and subject [judges] to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution. . . . [Without the doctrine of judicial immunity, judges] become amenable to every other species of correction by a Court . . . [O]ne hour at the bar—the next at the bench, of the same or some other Court. They would have a busy and harassing time, getting from one station to the other—from Judge to the accused—from corrector to the corrected.'"[75]

Acknowledging that suits for damages threaten judicial independence, Justice Powell vigorously pointed out that suits for injunctive relief pose even greater threats. Among other effects, he noted that the specter of contempt proceedings for alleged violations of injunctive orders is likely to inhibit unbiased judicial decision making.[76] Although Justice Powell conceded that Magistrate Pulliam had not appealed the district court's injunction, he maintained that the mischief inherent in such a remedy could nevertheless be well illustrated by the circumstances under which the court granted injunctive relief. It must be noted that the district court enjoined the magistrate from setting bail with a surety or cash bond except when the accused poses a danger to himself or others. Justice Powell stated that such a determination is normally left to the discretion of the arraigning judge.[77] This factual determination may be close and, in some instances, complex. After an injunction is issued, however, the arraigning magistrate would authorize pretrial detention at the peril of being held in contempt for making decisions which an enjoining federal judge might later determine to be incorrect.

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[74] *See id.* at 1987 (Powell, J., dissenting) (speaking for himself, Burger, C.J., Rehnquist, J., and O'Connor, J.).

[75] *Id.* at 1984, 1987 (quoting Taaffe v. Downes, 13 Eng. Rep. 15, 18, 20 (1813)).

[76] 104 S. Ct. at 1988 (Powell, J., dissenting).

Until the sage determination of the federal district judge for the Eastern District of Virginia, many state and federal judges may have understood that the principal purpose of bail is to secure the presence of the accused at trial. In the single case in which the Supreme Court reviewed the setting of bail by a federal district judge, *Stack v. Boyle*,[78] Chief Justice Vinson observed that the right to release before trial is conditioned upon the accused offering adequate assurance that he will stand trial and submit to a sentence if found guilty. Chief Justice Vinson further suggested that the modern practice of requiring a bail bond or sum of money subject to forfeiture serves as an additional assurance of the presence of the accused.[79] This general principle is preserved in the amended Bail Reform Act.[80] The Bail Reform Act specifically authorizes a federal judicial officer to impose conditions, including the execution of a bond with sureties or secured by cash as may be deemed reasonably necessary to assure the appearance of the accused. Whether by inadvertence or design, the federal district judge in *Pulliam* completely failed to take into account the central purpose of bail, namely, the securing of the presence of the accused.[81]

In 1972, in the case of *Argersinger v. Hamlin*,[82] the Supreme Court suggested that there are approximately forty to fifty million traffic misdemeanors in state courts annually. The Court also noted that there are approximately four to five million misdemeanors in state courts, excluding traffic violations.[83] Because these figures are based on pre-1970 statistical reports, it may be presumed that the numbers have increased rather than diminished.

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[77] *Id.* at 1988 n.15 (Powell, J., dissenting).

[78] 342 U.S. 1 (1951).

[79] *Id.* at 5.

[80] 18 U.S.C. § 3146(a) (1982).

[81] *See* 2 *Standards for Criminal Justice*, A.B.A. 10-5.1 and Commentary 10.64-.68 (2d ed. 1980).

[82] 407 U.S. 25 (1972).

[83] *Id.* at 34 (citing Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 Iowa L. Rev. 1249, 1261 (1970)).

State courts are confronted with a number of complex and difficult questions regarding limitations on their conduct in their judicial capacity. These issues include: what avenues are open to a state magistrate or traffic court judge who is confronted with a scofflaw who refuses to respond to a summons, or who, if placed on personal recognizance, does not appear?; may a warrant issue for the arrest of such a person and, if it does, what action should be open to the judge when the accused is again brought before the court?; if the judge happens to be Gladys Pulliam, can she set bail to assure that the accused will appear at the next setting of the trial date? Under the terms of the injunction issued against her by the federal district court, Magistrate Pulliam would be acting at her peril if she did so.

Of the forty to fifty million traffic misdemeanors noted in *Argersinger v. Hamlin*, it is reasonably safe to assume that many of these offenses are punishable only by fines. Furthermore, it is safe to assume that although misdemeanors such as speeding, crossing to the left of center, or failing to stop at a stop sign may be punishable by a jail term in many of these jurisdictions, such jail terms are seldom, if ever imposed. The question remains whether, pursuant to *Pulliam v. Allen*, federal courts will assume supervision of bail practices with respect to this formidable body of cases.

A mere contemplation of the problems confronting state and municipal judges indicates beyond a doubt that imposing the strait jacket of injunctive limitations destroys judges' usefulness to a greater extent than the possibility of a suit for damages. Indeed, I suggest that once a judge is enjoined by an order restricting his or her discretion in setting bail, the usefulness of that judge in the arraignment process is, for all practical purposes, eliminated. In *Stack v. Boyle*,[84] the Supreme Court suggested that a bond set at $50,000 for violation of the Smith Act, which prohibited membership in the communist party, was excessive.[85] The Supreme Court, however, with great deference to the trial judge, suggested to the petitioner that he move for reduction of bail in the federal district court.[86] This type of procedure is much more suitable than enjoining a judge from setting excessive bail in the future, as was done in the case of Gladys Pulliam.

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[84] 342 U.S. 1 (1951).

[85] *Id.* at 3.

[86] *Id.* at 7.

It should be noted that more than ninety percent of felonies, along with other types of litigation, are processed in state courts.[87] It is highly questionable whether federal courts would possess the competence or resources to supervise all the activities of state courts through civil actions culminating in injunctive relief. State courts were never intended as subordinate tribunals to federal courts. Their independence is essential to the proper administration of justice in this nation. Although federal courts enunciate the supreme law of the land within their sphere of jurisdiction,[88] the founding fathers always intended to preserve state sovereignty, and never suggested that states and their judicial officers be reduced to the status of mere provincial functionaries. James Madison pointed out in The *Federalist* papers that the genius of the new proposed federal government is that its powers would be limited to those specifically delegated while all other powers would be reserved to the states.[89] This concept was preserved in article X of the amendments to the Constitution which provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[90] The usurpation of state judicial power by blatantly subordinating state tribunals to federal courts effectively destroys this balance which was so laboriously conceived and constructed.

Lest it be felt that this article is overemphasizing the effect of injunctions upon judicial independence, let us now consider the effect of an award of counsel fees, which in some instances, provides a far greater deterrent than an award of damages. In *Pulliam*, the counsel fee awarded in the district court was $7,038 which together which costs totalled $7,691.09. This award was probably equivalent to or greater than the compensatory damage to which Allen and Nicholson would have been entitled for their incarceration. Allen was incarcerated for fourteen days, and Nicholson had been incarcerated four times for periods of two to six days. The award of the counsel fee by the federal district court, however, is only the tip of the iceberg. After running its course through the court of appeals and the Supreme Court, the ultimate fee and costs awarded to the successful counsel by agreement of the parties now is in the sum of $43,691.09. If it is thought that damages would deter a judge from independent and fearless decision-making, it must equally be conceded that the possibility of a $43,000 counsel fee accompanied by an injunction would deter even the most stouthearted judicial officer from deciding a case without fear of personal consequences.

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[87] Mr. Justice Douglas noted in *Argersinger v. Hamlin*, that in 1965, 314,000 defendants were charged with felonies in state courts as opposed to 24,000 in federal courts. 407 U.S. 25, 34 n.4 (1980) (citing President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, at 55 (1967)). Similar figures would be derived in the area of civil litigation as well.

[88] *See* U.S. CONST. art. VI, § 2 (supremacy clause).

[89] *See generally* The Federalist No. 45, at 303 (J. Madison) (J. Cooke ed. 1961) (discussing limitation of powers of federal government).

[90] U.S. CONST. art. X.

Clearly, the district court violated general principles of judicial immunity and independence by issuing an injunction and awarding damages. Furthermore, it is apparent that the court breached general equity principles in issuing this injunction. This unique and intimidating federal judicial relief was ordered without any showing that there was no adequate remedy at law by way of appeal or by petition for habeas corpus in the Virginia judicial system.[91]

It requires no great analysis of this singular and unprecedented decision to conclude that the doctrine of *Pulliam v. Allen* may well signal the twilight of judicial independence. Despite Justice Blackmun's pious exhortation that federal judges should exercise restraint and refrain from awarding equitable relief, and despite his reaffirmation of principles of comity and federalism, there is little guarantee that other federal judges will avoid the example of the federal judge of the Eastern District of Virginia in pursuing their knight errantry in search of constitutional violations.

Indeed, there is no better example than the injunction rendered against the Supreme Court of Virginia by a district court judge in *Supreme Court of Virginia v. Consumer's Union.*[92] Apparently believing a mere declaratory judgment to be insufficient, a federal district court judge in *Consumer's Union* enjoined the Supreme Court of Virginia from enforcing an ethical rule prohibiting attorneys from advertising their fees. It should also be noted that in *Consumer's Union*, the Supreme Court of Virginia merely committed the offense of passively failing to amend its ethical rules following the somewhat mixed signals given by the Supreme Court of the United States in *Bates v. State Bar of Arizona.*[93]

In the *Bates* case the Supreme Court of the United States, for the first time in the history of the Republic, determined that the highest court of a state, in the exercise of its supervisory power over members of the bar, was precluded by the first amendment from prohibiting advertising of fees for routine services by attorneys. In one fell swoop, the Court voided advertising ethics which had been adopted by almost every state pursuant to the American Bar Association Model Code. Vehemently dissenting from the *Bates* majority, Justice Powell suggested the difficulties which would arise from attempting to govern the advertising efforts of hundreds of thousands of lawyers. Strangely enough, in a later case, *In re R.M.J.*,[94] Justice Powell wrote a majority opinion for the Court in which regulation of advertising by attorneys was completely prohibited except for deceptive or inherently misleading advertising. Thus, the indications in *Bates* that state courts could still exercise supervision over advertising were largely swept away.

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[91] 104 S. Ct. at 1987 n.13 (Powell, J., dissenting).

[92] 446 U.S. 719 (1980).

[93] 433 U.S. 350 (1977); *see* Comment, Bates and O'Steen v. State Bar of Arizona: *From the Court to the Bar to the Consumer*, 9 LOY. U. CHI. L.J. 477, 500-03 (1978) (discussing problems with interpreting *Bates* decision).

An example of how the federal district court could have properly addressed the issues raised in *Consumer's Union* is found in a first circuit case. Following *Bates*, the Supreme Court of Rhode Island took steps to amend its disciplinary rules and adopted a provisional rule which regulated advertising by attorneys as the Rhode Island court perceived *Bates* to allow.[95] Litigation ensued in which the Supreme Court of Rhode Island instructed a law firm that its advertising violated the provisional rule.[96] This instruction resulted in an action brought against disciplinary counsel for the Rhode Island Supreme Court in federal district court.[97] The district court judge disagreed in part and agreed in part with the Rhode Island Supreme Court's limitation upon advertising. Because the district judge was sufficiently confident of the Rhode Island court's respect for the supremacy of federal law, he limited his judgment to a declaration of the partial invalidity of the Rhode Island rule.[98] Both parties appealed to the Court of Appeals for the First Circuit. Pending the appeal, the Supreme Court decided *In re R.M.J.*[99] This decision indicated that both the federal district judge and the Supreme Court of Rhode Island wrongly interpreted *Bates* and that henceforth only misleading advertising could be prohibited by a state court.[100] This mistaken interpretation of *Bates* resulted in an award of counsel fees against the Supreme Court of Rhode Island in the sum of $13,000.

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[94] 455 U.S. 191 (1982).

[95] *See* Provisional Order No. 11 of the Rhode Island Supreme Court Rules (adopted January 12, 1978) (disciplinary rules based on the American Bar Association's Model Code).

[96] Carter v. Lovett and Linder, Ltd., 425 A.2d 1244, 1245 (R.I. 1981).

[97] Lovett and Linder, Ltd. v. Carter, 523 F. Supp. 903 (D.R.I. 1981).

[98] *Id.* at 913.

[99] 455 U.S. 191 (1982).

Recently, in Supreme Court of *New Hampshire v. Piper*, the Supreme Court upheld a district court judge's determination that the New Hampshire Supreme Court's residency requirement was void.[101] Again, the federal judiciary limited itself to a declaratory judgment. Under the theory of *Pulliam*, however, the Court might well have issued an injunction against the Supreme Court of New Hampshire. In any event, counsel fees were assessed at $25,000.

Justice Douglas, that robust protector of civil rights who dissented from the grant of absolute judicial immunity, made the following observation in his dissenting opinion in *Pierson v. Ray*:

> This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistakes, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions.[102]

No more eloquent argument can be made in favor of immunizing judges, including state supreme court justices of our several states, who attempt to perform the role of setting ethical and disciplinary rules for attorneys in the light of, at best, murky guidance from the Supreme Court of the United States relating to the protection afforded by the first amendment to commercial speech as well as the determination of compelling state interests in setting requirements for membership in the state bar. This is only one example of an area in which state judges may make "honest mistakes." State judges are often unaware that they have made mistakes until the Supreme

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[100] *Id.* at 203. *See generally* Weisberger, *The Bill of Rights and Benevolent Despotism: A Look at the Supreme Court's Role in Education, Regulation of Attorney Advertising and Obscenity*, 17 SUFFOLK U.L. REV. 23, 34-41 (1983) (discussing regulation of attorney advertising by the federal judiciary).

[101] 105 S. Ct. 1272, 1280-81 (1985).

[102] Pierson v. Ray, 386 U.S. 547, 566 (1967) (Douglas, J., dissenting).

Court issues a new opinion which destroys the constitutional base upon which state judges thought their ruling rested. A litany of citations is not needed to establish the proposition that the Supreme Court has recently made a number of changes in its constitutional adjudication, particularly in relation to the exclusionary rule.[103] For example, in *Illinois v. Gates*[104] and *United States v. Leon*[105] the Court recently cast even more doubt on the scope and applicability of the exclusionary rule.

The *Pulliam* doctrine coupled with the lack of collegiality in the Court, and the mixed signals which it has sent regarding the meaning and application of the Bill of Rights, make the exercise of the judicial function by state courts a perilous occupation. This problem will be particularly true if federal courts supervise state convictions and the application of procedural safeguards by injunction in addition to habeas corpus review pursuant to 28 U.S.C. section 2254.[106]

The need for judicial independence perceived by Coke and his successors is as forceful a policy consideration today as it ever was in the past. The current members of the Supreme Court who supported the *Pulliam* decision are no more gifted than their predecessors who decided *Bradley v. Fisher* and *Pierson v. Ray*. Just as Justice Taney's opinion in the *Dred Scott* case[107] may have precipitated the "War Between the States," it may some day be said that Justice Blackmun's opinion in *Pulliam v. Allen* signaled the twilight and decline of judicial independence.

IV. APPLICABILITY OF *PULLIAM V. ALLEN* TO FEDERAL JUDGES

Lest it be thought only state judges may be victims of harassing litigation pursuant to the *Pulliam* doctrine, it should be noted that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[108] enunciated the doctrine of constitutional tort. Even though section 1983 is not applicable to federal officers, a remedy may be sought against such officers for violation of a right guaranteed by the federal constitution. *Butz v. Economu*[109] further recognized that it would be inappropriate to draw a distinction for immunity purposes between federal officers who are liable for constitutional torts and state officers who are subject to liability under section 1983.[110] Consequently, in *Butz*, the Court determined that the same immunities are afforded federal executives and quasi-judicial officers as their state government counterparts in section 1983 litigation.[111] An interpretation of *Butz* in the light of *Pulliam* leads to the conclusion that injunctive relief could be awarded against a federal magistrate or judge for violation of a person's constitutional rights. In addition to injunctive relief, the provisions of the Equal Access to Justice Act[112] may authorize the award of an attorney's fee against "any official of the United States acting in his or her official capacity. . . ." Therefore, the twilight of judicial independence signaled by *Pulliam* may darken the horizon not only of state but federal judges as well.

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[103] *See* Weisberger, *The Exclusionary Rule: Nine Authors in Search of a Principle*, 34 S.C.L. Rev. 253, 257 (1982) (discussing myriad of decisions of standards for exclusionary rule).

[104] *See* 462 U.S. 213, 238 (1983) (court abandons two tier probable cause test in favor of totality of circumstances test).

[105] *See* 104 S. Ct. 3405, 3416 (1984) (court creates good faith exception to exclusionary rule).

[106] *See* 28 U.S.C. § 2254(2) (1982) (discussing petitions for habeas corpus).

[107] 60 U.S. 393 (1856).

[108] *See* 403 U.S. 388, 395 (1971) (damages as remedy for violation of fourth amendment).

V. CONCLUSION

In adopting the Civil Rights Act of 1871, it is likely that a majority of Congress desired to secure the civil rights of the recently freed slaves in the confederate states. Although Justice Douglas quoted some of the congressional debate which indicated a recommendation that state judges might be affected[113] there is no suggestion that judges should be subjected to civil action for honest mistakes. The *Pulliam* doctrine exposes state and federal judges to a wide range of harassing and vexatious litigation. In addition, the doctrine may subject judges to injunctive orders accompanied by substantial costs and huge counsel fees.

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[109] 438 U.S. 478 (1978).

[110] *Id.* at 501. The *Butz* case involved an action brought against the Secretary of Agriculture. *Id.* at 481-82. Mr. Justice White, speaking for a majority of the Court, made two very pertinent observations:

> The Government argues that the cases involving state officials are distinguishable because they reflect the need to preserve the effectiveness of the right of action authorized by § 1983. But as we discuss more fully below, the cause of action recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions.

438 U.S. 478, 501 (1978). To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head. *Id.* at 504.

[111] 438 U.S. 478, 504 (1978).

[112] 28 U.S.C. § 2412 (1982).

[113] Pierson v. Ray, 386 U.S. 547, 561-64 (1967).

In enacting section 1983, Congress never intended to destroy or dilute judicial independence in the ordinary course of litigation. Perhaps no person in the history of the federal judiciary did more to implement the purposes and goals of the Civil Rights Act than Chief Justice Warren. Nevertheless, after careful analysis in *Pierson v. Ray*,[114] he concluded that Congress would have clearly provided for diminution or abrogation of judicial immunity in the Civil Rights Act had it so intended.[115]

Justice Frankfurter's opinions frequently warned against "throwing the baby out with the bath water." While Magistrate Pulliam's actions may have been erroneous, the radical action of injunctive relief against a judicial officer constitutes a cure far worse than the disease.

The specter of harassing litigation brought by disappointed parties against judicial officers is a chilling prospect, indeed. At a time when the courts of this country are overburdened with litigation, when citizens seek redress in the courts for a greater variety of perceived wrongs than ever before, it seems ill advised to add a new layer of distracting litigation upon the shock troops of the judicial system. Such flank attacks upon judicial officers can only result in increasing timidity and a tendency to avoid close and controversial decisions whenever possible. This type of litigation inevitably produces a syndrome of responses which ill befits an American judiciary which has provided the greatest safeguard of individual liberties ever known.

Although I feel Justice Blackmun's opinion in *Pulliam v. Allen* is based upon an erroneous application of history and a faulty analysis of the effects of injunctive relief upon judicial independence, I recognize this majority opinion is now the law of the land. Since the Court interpreted the intention of Congress as enunciated in sections 1983 and 1988, however, it is within Congress's province to clarify these statutes so that they provide specifically for judicial immunity from both injunctive relief and the award of counsel fees. No other course will guarantee the future of judicial independence in this country.

In a glorious example of respect for the judiciary, President Nixon accepted without question a decision of the Supreme Court of the United States ordering him to turn over evidentiary materials which could only result in his political ruin.[116] No greater example of the strength of "the least dangerous branch"[117] and the reverence in which it is held can be cited in the history of this or any other nation. This reverence and respect has been slowly created over a period of 200 years. Diminution of the stature of state and lower federal courts cannot fail to affect the prestige of the Supreme Court as well. It would appear at best imprudent and at worst sheer folly to weaken the foundations of our judicial system by acceptance or implementation of the *Pulliam* doctrine.

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[114] *Id.* at 547.

[115] *Id.* at 554-55.

[116] United States v. Nixon, 418 U.S. 683, 688 (1974).

[117] A. Bickel, The Least Dangerous Branch (1962).

Supreme Court of the State of Rhode Island
Providence, Rhode Island 02903

CHAMBERS OF
JUSTICE JOSEPH R. WEISBERGER

March 15, 1988

Staff, Senator Howell Heflin
Subcommittee on Courts and Administrative Practice
Senate Judiciary Committee
223 Hart Senate Office Building
Washington, D.C. 20510

Ladies and Gentlemen of Senator Heflin's Staff:

In response to Senator Heflin's letter of March 8, 1988, I set forth herein my answers to questions posed for Panel III.

Q. 1. After the *Pulliam* decision, you as state court judge could be required to pay attorney fees. What protections, if any, do state court judges have if the state fails to indemnify them against an award of these attorney fees?

A. 1. In the event that a state refuses or fails to indemnify a state judge against an award of attorney's fees, the sole protection which the state judge might have is to insure against the risk. Such insurance is presently available from the National Union Fire Insurance Company of Pennsylvania. I am not aware of any other insurance company which offers this type of coverage. The premium for group policies presently approximates $850 per year per judge. Such insurance would provide coverage for awards of counsel fee as well as the cost of defense. The difficulty with this remedy is that such premiums are likely to escalate in the event of proliferation of actions against state judges for injunctive relief. We have seen that premiums for medical malpractice, once modest and within the financial capability of all physicians, have now reached the point where many practitioners are spending significant portions of their income to defray malpractice premiums. A similar fate may befall state judges who have sought to protect themselves by insurance.

The plain fact of the matter is that the vast majority of judges are uninsured. There were 2,105 policy holders as of February 19, 1988. Considering that there are approximately 6,000 judges of general jurisdiction and approximately 25,000 state judges of limited jurisdiction in this country, only a tiny minority are insured. The remainder of state judges are at personal risk in the event that their state fails or refuses to indemnify them.

Q. 2. This is for any member of the panel. Since the *Pulliam* decision, indications are that there may be a significant increase in filing of federal actions against state court judicial officers. What is your view about the possibility of a significant increase in these cases if appropriate legislation is not enacted to restrict recovery of attorney's fees against state judicial officers acting in their official capacity?

A. 2. I believe that there is the possibility of significant increase in the numbers of federal actions against state judicial officers, if the *Pulliam* decision is not corrected. Until 1960 very few actions were filed against state officers under 42 U.S.C. § 1983. After the United States Supreme Court in *Monroe v. Pape* held that such actions could be brought without exhausting state remedies, such suits multiplied exponentially. during the past year approximately 19,000 actions were brought against state officers for real or imagined grievances by a wide variety of individuals. A significant portion of such actions were brought by inmates of state correctional institutions.

I believe that actions against state judges are presently being filed at the rate of about 700 per year. Prior to *Pulliam* the rate of filing was approximately 300 per year. I believe, however, that these figures represent only the tip of an iceberg which will later loom into view as potential litigants perceive an opportunity to haul a state judge before a federal court in order to seek injunctive relief. Members of the bar will also perceive an opportunity to achieve a significant counsel fee in the event of success. These two ingredients are likely to result in a heavy increase of cases.

Q. 3. The ABA supports S. 1515, which would generally prohibit both injunctive relief and attorney fee awards against judges. This appears to be broader than either of the other two approaches, which are limited to attorney fee awards. Are you concerned that this may be overbroad, and could you support other approaches as an alternative to S. 1515?

A. 3. I do not believe that S. 1515 is overbroad. Its objective is to restore judicial immunity as it existed prior to *Pulliam v. Allen*. The American Bar Association firmly believes that injunctive actions against judges, either state or federal, are fundamentally wrong. It is for that reason that the Association opposes injunctive relief, save in very limited circumstances. It follows that if injunctive relief is wrong, than the award of attorney's fees incident to such relief is wrong as well. Those judges who testified before the Heflin Subcommittee met after the hearing and agreed to support S. 1515 both as to the elimination of injunctive relief and the prohibition of attorney's fees in respect to an action brought against a judge for an act committed in his or her judicial capacity. We believe that this position is both consistent and logical.

The American Bar Association has supported legislation pending before this Subcommittee which would have the effect of prohibiting the award of counsel fees in an action brought against a judge. We have not changed this position, but believe that such legislation constitutes only a partial remedy. If judicial independence is to be restored, then immunity against injunctive relief must be restored as well.

The foregoing constitutes my answers to the questions posed in Senator Heflin's letter. I thank you for your consideration of these answers as a supplement to my testimony given February 26, 1988.

Very truly yours,

Joseph R Weisberger

Joseph R. Weisberger

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

PHILLIP J. ROTH
JUDGE

ROOM 536
(503) 248-3181

March 14, 1988

Senator Howell T. Heflin
728 Senate Hart Building
Washington, D.C. 20510

Dear Senator Heflin:

Pursuant to your letter of March 8, please find enclosed copies of the answers to the questions of Senators Thurmond and Grassley. Your letter arrived Saturday, March 12, and that evening I left for Phoenix. The response is being made to these questions by long distance dictation.

I did confer with Justice Weisberger before responding to your inquiries. We are all appreciative of your courtesies and the prompt manner in which you are taking up consideration of this judicial immunity legislation. We judges feel fortunate that someone of your background and experience has taken the lead in moving this legislation.

Thank you again for your interest and help.

Sincerely,

Phillip J. Roth

PHILLIP J. ROTH

PJR/af

Enclosure

QUESTIONS FROM SENATOR THURMOND FOR THE HEARING ON JUDICIAL IMMUNITY

JUDICIARY SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

QUESTION:

1. After the Pulliam decision, you as state court judges could be required to pay attorney fees. What protections, if any, do state court judges have if the state fails to indemnify them against an award of these attorney fees?

ANSWER:
There are no protections then. The judges pay from their own private funds. The judge would be personally liable for payment of attorney fee awards under 42 USC 1988 if the state fails to indemnify the judge.

QUESTION:

2. This is for any member of the panel. Since the Pulliam decision, indications are that there may be a significant increase in filing of federal actions against state court judicial officers. What is your view about the possibility of significant increase in these cases if appropriate legislation is not enacted to restrict recovery of attorney fees against state judicial officers acting in their official capacity?

ANSWER:

There has been a signficant increase in actions filed against the judiciary since the passage of 42 USC 1988 and the use of the functional analysis test introduced in Economou v. Butz and applied against the judiciary for the first time in Consumers Union v. Supreme Court of Virginia. As Justice Weisberger stated at the hearing, there are approximately 25,000 state special court judges and 6,000 general court judges in the United States. I believe it would be safe to say the number of claims per year against judges is more than 1,000 per year. I am convinced that the application of 42 USC 1988 has stimulated and encouraged litigation targeted at judges. It is clear that the removal of attorney fees and the threat of injunctive sanctions against the judges would once again protect them from time-consuming and intimidating litigation.

QUESTION FROM SENATOR GRASSLEY:

1. The ABA supports S. 1515, which would generally prohibit both injunctive relief and attorney fee awards against judges. This appears to be broader than either of the other two approaches, which are limited to attorney fee awards. Are you concerned that this may be overbroad, and could you support the other approaches as an alternative to S. 1515?

ANSWER:

We of the ABA are firm in the belief that the granting of an injunction against a judge, either state or federal, is fundamentally wrong and should only be permitted in rare instances. S. 1515 would not, however, disturb the remedy of declaratory relief from federal courts. In the United States we have in our judicial system the most elaborate review ever devised. At common law an injunction against the judge was unknown. Judicial immunity from civil actions has preserved judicial independence for four centuries. We therefore believe that S. 1515 is not overbroad and that it does no more than restore this common law immunity. While the Association could support the other two approaches under consideration by the Subcommittee as a response to the attorneys' fees issue, only S. 1515 would provide a complete response to the Pulliam decision since it is the only proposal that addresses both the attorneys' fees and injunctive relief issues.

Senator **Heflin**. I see we have a vote on and we are now very limited in the time that we can go to vote. If you don't mind, we would like to interrupt. And if you would stay where you are, we will come back and question you, unless you have something briefly you want to say, Senator Thurmond.

Senator **Thurmond**. I want to welcome you gentlemen here and I think you're here on a worthy cause. I ask that my statement be put in the record endorsing these bills.

Senator **Heflin**. Hearing no objection, it will be entered.

[The prepared statement of Senator Strom Thurmond follows:]

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

MR. CHAIRMAN:

Today we are assembled to conduct hearings on S.1512, S.1515, and section 614 of S.1482 - the "Judicial Branch Improvements Act of 1987". S.1512 was introduced by Senator Hatch, Senator Heflin and me. S.1515 and S.1482 were introduced by Senator Heflin. These bills all address the issue of erosion of judicial independence resulting from the Supreme Court decision in Pulliam v. Allen. These bills all resolve the same problem in slightly different ways.

In a 5 to 4 decision, the court in Pulliam held that judicial immunity is not a bar to an award of attorney fees against a state court judge acting in his official capacity in a federal action seeking injunctive relief under section 1983 of Title 42 of the United States code.

The notion of judicial independence is deeply embedded in our common law heritage. It is essential to ensure justice because judicial officers must be free to make appropriate decisions within their official capacity without fear of reprisal. An independent judiciary is a vital component in any democracy which cannot be compromised.

The decision in Pulliam limits the doctrine of judicial immunity by allowing claims for attorney fees when injunctive relief is sought against a state court judicial officer under a federal action. This is simply not appropriate. I believe that adoption of legislation is necessary to resolve this disturbing problem.

The bills before us today will restore the independence of state court justices, judges, and judicial officers. If adopted, claims for attorney fees in a federal action for injunctive relief will no longer subject judges to the threat of personal liability. As a result, judges will administer the law independently and without fear of persecution.

I am most interested in this issue and look forward to hearing from the witnesses that will testify today.

Senator HEFLIN. We will recess briefly until we can return after voting.

[A brief recess was taken.]

Senator HEFLIN. Judge Weisberger, you wrote an article in 1985 on the *Pulliam* decision and in that article you suggested that *Pulliam* may be applicable to Federal judges based on the doctrine of constitutional torts. Would you please elaborate on this statement. And do you think this is still a real possibility?

Justice WEISBERGER. I believe that, indeed, it is, Mr. Chairman. As you know, under the *Bivens* doctrine, any Federal officer may be sued for committing a constitutional tort.

In *Butz* v. *Economu*, Justice White, who was dealing then with a quasi-judicial officer in the Department of Agriculture, took the position that such an officer could be subjected to suit.

But, luckily, went on further and said that he would have, or she would have, judicial immunity because of the nature of the function, taking the functional approach.

But if you add the *Pulliam* doctrine to the doctrine of *Butz* v. *Economu* it would seem fairly reasonable to infer that a judge, Federal district judge, or one of the higher justices, might be sued for injunctive relief, probably in another Federal court, not under 1983, but under the doctrine of constitutional tort.

And this is one of the things, Mr. Chairman, that I think the ACLU should take into account.

If, let us say, a Federal district judge might have a policy of favoring or at least perceived to favor the civil rights of a large group of individuals, there might be a very wealthy corporate entity that might bring suit against that Federal district judge under the doctrine of constitutional tort alleging violation of due process.

This might have to do, let's say, with a public utility or some other very competent, very wealthy and very resourceful entity. And, therefore, this doctrine might be used to subvert civil rights as opposed to being used only to support them.

And that's where I think the danger comes in to the Federal judges and I think that we would all admit—certainly our brethren in the ACLU and NAACP would have to admit that the Federal judiciary has been a great source of strength in sustaining and establishing civil rights.

Had they been subject to vexatious and harassing litigation query whether they would have had the same independence of spirit so as to establish and maintain those rights.

Does that answer your question, Mr. Chairman?

Senator HEFLIN. Thank you. The ACLU is concerned with egregious situations where State judges engage in actions which clearly violate a constitutional right. What remedy is available now to deal with those egregious situations? Judge Roth, would you like to respond to that?

Judge Roth. Well, I think if you had a grievous situation, of course, the writ of habeas corpus, mandamus—supposedly you had—the bail situation—I think you could move to another court to get it reduced or be given the right for immediate release on a recog.

I would think declaratory relief—there are so many things available, I believe other than tying a judge up with an injunction.

Senator HEFLIN. In the *Forrester* decision, of course, which involved the discharge of the probation officer, the issue, of course, arose on the basis of sex as to the violation of the equal protection laws.

Has the American Bar taken any position on this decision? Would the ABA like to include remedial legislation to respond to that situation? There is some langauge in the bills that would take care of officials, which could include administrative acts.

Now, this is an issue of which I am undecided. I have mixed feelings about it. I can foresee a situation where a law clerk or even a probation officer who did not carry out the judicial policy of the judge, might be subject to harassment. In other words, they could be subject to harassment. On the other hand, should immunity apply or not apply to a judge in a situation when a judge has a legitimate reason to carry out his policy through his employees. Do you have any thoughts on that?

Justice WEISBERGER. Mr. Chairman, I would like to answer that, because the American Bar Association has taken no position on *Forrester* v. *White.*

Our resolution which is in the record deals only with judicial action as opposed to administrative action.

To answer it from my own personal point of view I am of the opinion that a judge as employer ought to be treated as an employer.

I think that he would have a qualified immunity in that instance if he acts in good faith. But I would not take the position that a judge, as employer, should be entitled to the same absolute immunity which we are seeking to restore in regard to his or her judicial functions.

Senator HEFLIN. Would you apply that to a law clerk?

Justice WEISBERGER. I would think so. If the law clerk were discharged, first of all—generally the law clerk serves at the judge's pleasure.

In the event that the law clerk raised the specter of sex discrimination or some other discrimination, then I suppose that it would then be a matter of determining the facts.

But I couldn't take the position, at least from my own personal point of view, that the judge should have absolute immunity.

Any employer has qualified immunity so long as he's acting in good faith and so long as he's not violating a contract to discharge someone who serves at his or her pleasure.

Senator HEFLIN. Well, that goes to the ultimate decision of the fact. However, if, as it has been testified, that threat affects the independence of the judiciary, could it not impede a judicial decision? Is that an area that can be threatening or not?

Justice WEISBERGER. No question it could be threatening and no question it can be vexatious. An employee can be as vexatious as any litigant. But I can't take the position with all candor and sincerity that judges should be insulated from all ills that may be pressed upon other individuals whether they are judges are not.

I only think that the judge should be entitled to immunity for his or her judicial acts in which the independence of spirit is so important to our constitutional system.

The judge as employer or the judge as supervisor of the building of roads, as he may be in some areas of the country, I think should have to take his or her chances as another officer would have to take who would be in a similar situation.

Senator HEFLIN. Mr. Harnett, a lot has been submitted by the NAACP Legal Defense Fund. They state that the bills to overturn *Pulliam* would make it virtually impossible for plaintiffs who have suffered violations of their civil and constitutional rights to retain adequate legal counsel and thereby to vindicate their rights.

I assume that if the ABA agreed with this assessment, they would have opposed this legislation. Is that correct? Why do you support this bill and will this bill be a problem? Do you agree with the assessment by the NAACP Legal Defense Fund?

Mr. HARNETT. I don't agree with the assessment, because I think the bar and attorneys at the bar have always been willing, able, and available to proceed with causes based upon justice and rights regardless of the opportunity of obtaining counsel fees.

The presence of counsel fees has a deleterious effect in another way, it could encourage people to bring baseless claims because attorneys—their own personal motivation could see a means of getting support for their action and getting their fees guaranteed by payment from the body public.

Senator HEFLIN. If judicial immunity did not apply to injunctive relief but prohibited the award of attorneys' fees, could an indigent individual, who was pursuing a case through court-appointed counsel, also pursue independent injunctive relief?

Justice WEISBERGER. I should point out, Mr. Chairman, that in almost every State there are public interest firms which are supported by public funds who represent the indigent.

They may be denominated Rhode Island Legal Services or might be the Legal Aid Society. In fact, in *Morrison* v. *Ayub,* which is one of the cases cited by the ACLU, such a firm represented the plaintiffs who were complaining that they were being jailed without the appointment of counsel in violation of *Argosinger.*

And these particular attorneys, though they didn't actually get an injunction, the case was dismissed as moot, when a Court of Common Pleas Judge ordered these district judges in Beaver County, PA, to appoint counsel. So, the matter was really resolved.

Nevertheless, these attorneys who were being paid with public funds obtained a counsel fee of $24,000 in addition to that. There's an example of a situation in which the remedy was in no way affected by the counsel fee. The counsel fee was icing on the cake.

Senator HEFLIN. All right. Thank you, gentlemen. We appreciate your testimony.

We next have Mr. Morton H. Halperin of the American Civil Liberties Union. Mr. Ralston of the NAACP Legal Defense Fund could not be here today, but his statement will be placed in the record in full.

[Statement submitted by the NAACP follows:]

Legal Defense Fund
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, New York, N.Y. 10013 • (212) 219-1900

806 Fifteenth Street, N.W., Suite 940
Washington, D.C. 20005 • (202) 638-3278

February 25, 1988

The Honorable Howell Heflin
Senator
Chairman, Subcommittee on
Courts and Administrative Practice
Senate Judiciary Committee
Room 223
Hart Senate Office Building
Washington, D.C. 20510

Re: S.1512, S.1515, and Sec. 614. of S.1482

Dear Senator Heflin:

The purpose of this letter is to state the opposition of the NAACP Legal Defense and Educational Fund, Inc., to the above bills, which would limit the availability of attorneys' fees and injunctive relief in civil rights actions where the defendant is a state judicial officer.

With regard to attorneys' fees the three bills are evidently in response to the Supreme Court decisions in Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) and Pulliam v. Allen, 466 U.S. 522 (1984), which held that in an action brought under 42 U.S.C. § 1983, attorneys' fees may be awarded pursuant to 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Act of 1976, to the prevailing plaintiff where the defendants are state court judges. Although the Legal Defense Fund is aware that the decision in Pulliam has caused concern among state and local judges, we believe that the concern is misplaced and that an abrogation of the present right of civil rights plaintiffs to obtain attorneys' fees in such actions is unnecessary and undesirable.

In its decision in Hutto v. Finney, 437 U.S. 678 (1978), which first interpreted § 1988, the Supreme Court made it clear that when a state or local government official is sued in his or her official capacity and when the plaintiff prevails by establishing a denial of constitutional rights, fees may be awarded and required to be paid by the state or local governmental entity to which the official was connected. This interpretation of the Fees Act is fully consistent with the

Contributions are deductible for U.S. income tax purposes

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

intent of Congress when it passed the statute. Thus, the Senate report states:

> Fee awards are therefore provided in cases . . . under, inter alia, the Fourteenth Amendment. . . . [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-1011 (94th Cong., 2d Sess.) p. 5 (1976).

The Senate Report goes on to make it clear that _only_ where an official has been demonstrated to have acted in bad faith can such an official be personally liable for fees in his individual capacity. _Id._, at n. 7. Similarly, the House Report notes the greater resources available to governments that "provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." H. Rep. No. 94-1558 (94th Cong., 2d Sess.) p. 7 (1976).

Based on this clear legislative intent, the Supreme Court in _Hutto_ squarely rejected the argument that fees should be assessed against the officials personally, with reimbursement coming from the state or local government. Rather, except in cases of bad faith, awards should be directly against the governmental unit involved. 437 U.S. at 699, n. 32.

Thus, in virtually all cases where fees are awarded against _any_ state or local official, including judges, those fees will be paid out of government funds and there is no danger or likelihood that any judge will be personally liable for the payment of fees or costs. Indeed, in our long experience of handling civil rights cases against hundreds of state, local, and federal government officials and agencies, we are aware of no instance in which any defendant named in his or her official capacity has had to pay a penny of fees or costs out of his or her own pocket. Further, the Legal Defense Fund has never requested such a payment and we believe that such an award would not be appropriate except in those rare cases where a defendant has acted in bad faith.

In short, the bill is unnecessary insofar as it seeks to ensure that state judges will not pay fees personally. To the extent it would deny fees to plaintiffs totally simply because the named defendant is a state court judge, the bills would make it virtually impossible for plaintiffs who have suffered violations of their civil and constitutional rights to obtain adequate legal counsel and thereby to vindicate such rights.

With regard to the provision in S. 1515 divesting federal courts of jurisdiction to award injunctive relief in actions against state court judges, we also believe that the provision is unnecessary and would simply result in protracting litigation. Under current law, a federal judge acting in equity has full discretion to shape relief as necessary to achieve compliance with constitutional requirements. Thus, if a federal district judge is of the view that an injunction is not required against a particular defendant, including a state court judge, the district court may simply issue a declaratory judgment. And, as the Supreme Court noted in Pulliam, it is the rare case in which a judge will be enjoined. 466 U.S. at 528.

On the other hand, the court may and should be able to issue an injunction where, under the circumstances of the case, one is necessary. Under S.1515 this discretion would be eliminated; in every case involving a state court judge, regardless of the circumstances or intransigence of the judge, the district court would be limited initially to a declaratory judgment and the parties would then have to return for an injunction if that judgment were disobeyed. At the same time, even though a plaintiff had been required to spend more time to obtain necessary relief, he or she would not be able to recover the attorneys' fees required to obtain that relief.

We are of the view that the instances in which a federal court will be required to issue an injunction against the state judge would be rare. It has been necessary in the past, however; for example, our experience in representing plaintiffs in Selma, Alabama, in the 1960's leads us to conclude that such a restriction on the power of the federal courts could have serious consequences. In those dark days a number of state court judges unfortunately actively participated in wholesale denials of federal constitutional rights; it was essential in protecting the rights of civil rights activists that the federal courts were vested with jurisdiction to issue injunctions quickly.

In summary, the Legal Defense Fund is firmly of the view that the proposed restrictions on attorneys' fees and injunctive relief in cases involving state court judges are unnecessary, since the problems they purport to solve are non-existent. To the extent the bills would go further, they would erode the ability of citizens to enforce their civil rights and, thereby, would set an unfortunate precedent in favor of cutting back on the ability of federal courts to give full protection to those rights.

Respectfully submitted

Julius LeVonne Chambers/BL

Julius LeVonne Chambers
Director-Counsel
NAACP Legal Defense and
Educational Fund, Inc.

Senator **Heflin**. Mr. Halperin, we would be delighted to hear from you now.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. **Halperin**. Mr. Chairman, it's a pleasure to be here. I do have to confess that I feel somewhat lonely in this array of witnesses, but I will——

Senator **Heflin**. That's not unusual for you. [Laughter.]

Mr. **Halperin**. It's not unusual for the ACLU, in fact. We're often in this position.

Our view is, as you know, that there is no need for this legislation, that the balance that has been struck here is working well.

There has been some quoting from the *Forrester* case and I would like to selectively quote myself from the case, but I would like to ask permission that my statement be placed in the record and that the full text of that decision be placed in the record as an attachment to my statement.

Senator **Heflin**. It will be included.

Mr. **Halperin**. The sentence that has been quoted about the danger of subjecting officials to liability is followed in the opinion of Justice O'Connor for a unanimous Court with this sentence:

> Aware of the salutatory effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in Court.

And Justice O'Connor goes on at the end of the opinion to suggest, as I quote in my statement, that "perhaps judges are more aware of their own problems than they are of everybody else's. And that therefore, Courts," she suggests, "should be very leery of extending judicial immunity beyond the point of where it now is."

As a matter of practice, it has been suggested already, State judges seldom are confronted with injunctions by Federal judges. We haven't heard any instances given since *Pulliam* that that's happened. And judges have never been required to pay fees. That's as far as we can tell and, again, all the testimony this morning supported the view that they have not been required to pay fees.

Indeed, our view is if Congress is going to act in this area at all, it ought to cut back on judicial immunity, it ought to make State judges have the same kind of liability that other officials have, that is only the qualified immunity, which is simply that you not do something that violates clearly established constitutional law.

If you behave in a way that doesn't violate clearly established constitutional law, you have qualified immunity and we think that's sufficient for judges, ought to be for judges, as for everyone else.

Now, it's been mentioned before, we don't take this view of State judges out of some misguided notion that they do not effectively protect individual rights.

The State courts have been very active in protecting those rights and we applaud them. But we take this view because we think that the balance is right and that the adverse consequences which are said to occur from the fact that State judges can be subjected to injunctions and to attorneys' fees simply does not bear serious analysis.

We've been told today something which I find absolutely astonishing. We've been told that State judges do not do what the Constitution and their view of justice requires of them, because they fear lawsuits.

I don't believe that. I believe that State judges, despite the fear of lawsuits, despite the fear that they won't get reelected, do what they believe the law requires. The fear of not being reelected seems to me a much more serious threat to a judge who's willing to bend his or her view of the law to popular whims than the occasional lawsuit.

I don't believe that that's true at all. I believe that State judges do what they believe the Constitution and the laws and justice requires and that they do not permit themselves to be intimidated by this.

The same arguments about vexatious and overtaxing lawsuits were made about executive branch officials. They were confronted by the Supreme Court about State Governors, about high officials of the executive branch of the Government.

And with the exception of the President, the Supreme Court has said, no, that the balance should be struck by allowing those lawsuits, because we believe that State officials and Federal officials and, I believe, State judges will do their duty despite the fear of lawsuits.

Lawsuits can only be brought successfully if they violate constitutional rights. And if they do violate those rights, I believe they should be subject to lawsuits.

Now, we were told this morning that the real problem is not that they ultimately might have to pay the attorneys' fees or even that they would be enjoined. The real problem is that judges don't want to be sued.

Well, the fact is nobody wants to be sued. But the fact also is even if you pass these statutes, State judges could still be sued for declaratory relief.

So, if their real effort is to just not be sued at all because it's undignified, you have to go much further even than the bills go and even where the ABA is asking you to go, because the ABA position, as I understand it, would still permit declaratory relief from Federal judges.

Now, as to injunctive relief, I think the statement by Justice Blackmun is right, that if you adopted an absolute rule, it would mean, as he says, that it would foreclose relief in situations where in the opinion of the Federal judge that relief is constitutionally required and necessary to prevent irreparable harm.

The fact is that Federal judges do not likely enjoin State judges. We have not had a single case that's been reported, that anybody's testified to, since *Pulliam* where that has, in fact, occurred.

And the reason is that I think State judges have become much more sensitive to their obligations to the Constitution. They don't take acts that violate people's constitutional rights. And, therefore, Federal judges don't enjoin them.

And they will only enjoin them in extraordinary situations where that relief is, as Justice Blackmun said, constitutionally required and necessary to prevent irreparable harm.

I do not believe that the Congress should take away that power, which is used very sparingly and which will only be used in those kinds of extreme situations.

Now, as far as attorneys' fees are concerned, here the concern is not to deter judges but to insure that fees are available so as to make it possible to bring lawsuits.

We were told that the members of the bar are so public spirited that they will bring lawsuits regardless of whether fees are available.

I can tell you that is simply not true. When we talked to firms around the country on behalf of the ACLU or other groups about taking cases which involved violations of constitutional rights, the second question they ask is, is there a possibility of fees?

And the fact is that the availability of fees makes people willing to take cases which have merit.

We were told that it leads to meritless cases. But that's simply not true. Because if you bring a meritless case, you don't get attorneys' fees. You have to win the case to get the fees.

And the notion that fees stimulate meritless cases, as I think is simply groundless, the fact is that fees are necessary because the availability of pro bono legal help without the possibility of fees simply does not cover the existing cases.

As we say in our testimony, we have no desire to have the judges pay those fees. And we think they've come to the wrong legislatures.

Where they should be going is to the State legislatures because the solution to this problem which we think is the fairest and most equitable to everybody is to have the States pass statutes in which they not only agree to indemnify the judges, but agreed to be sued for fees in cases brought against State judges.

That would mean that you would sue the judge if necessary for declaratory or injunctive relief, but you then sue the State for the attorneys' fees.

And if you found—if the Federal judge found the constitutional rights have been violated, the fees would be assessed against the State.

That is, we think, the fairest way all around. It means that judges do not have to worry about this liability. They don't have to pay the insurance.

But the cases can be brought and the fees assessed if, in fact, and only if a State judge has violated the constitutional rights of a person within the United States.

And we would urge, rather than enacting this legislation, to enact legislation that would encourage the States to act by providing that State judges are not liable for attorneys' fees if the State has consented to be sued for those fees in cases arising out of the actions of Federal judges.

We think the passing of that legislation would send the State judges, the people who testified here today, back to where they should be going, to their own State legislatures.

And the States ought to, and under that stimulus from the Congress, would enact the legislation, which would satisfy all of the interests that are at stake here.

Judges would not fear large fees that they might have to pay, but the cases could be brought in the knowledge that if a constitutional right was violated, there would be the necessary fees and costs.

I appreciate the chance to testify before you and, of course, would be delighted to answer any questions.

Senator **Heflin**. Without objection, the statement of Mr. Morton H. Halperin will be placed in the record in its entirety at this point.

[The statement of Mr. Halperin and additional material for the record follow:]

Testimony of

Morton H. Halperin
Director

Washington Office of the American
Civil Liberties Union

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify today on behalf of the American Civil Liberties Union on proposed changes in judicial immunity as embodied in Senate bills 1512, 1515, and 1482. The ACLU is a nationwide, non-partisan organization of more than 275,000 members devoted to protecting the Bill of Rights.

Briefly put, the ACLU opposes the suggested changes in the current state of judicial immunity. We believe that Congress and the courts have fashioned a reasonable balance in light of the "undeniable tension between official immunities and the ideal of the rule of law." Forrester v. White 56 U.S.L.W. 4067, 4068 (1988).

Judges are now absolutely immune from damages for judicial functions. See e.g. Pierson v. Ray, 386 U.S. 547 (1967): Stump v. Sparkman, 435 U.S. 349 (1978). They have only the qualified immunity available to other government officials for non-judicial actions. Forrester v. White supra. Judges, however, may be sued for injunctive and declaratory relief and may be held liable for attorneys fees under the Civil Rights Attorney's Fees Awards Act (42 USC sec. 1988). Pulliam v. Allen, 466 U.S. 522 (1984). The proposed legislation seeks to reverse Pulliam.

As a matter of practice, federal judges seldom enjoin the actions of state judges and only rarely order attorneys fees against them. When courts do order fees paid, in every case that we are aware of the government has paid the fees for the judge held liable. We see no evidence since Pulliam of the chilling effect on the conduct of state judges which is said to justify this legislation.

Indeed the ACLU believes that Congress should, if it takes any action in this area, overrule Pierson. This would give judges the same qualified immunity which provides ample protection, and strikes the right balance, for executive branch officials and members of Congress.

We do not take this position out of any misconceived or outdated view of state courts. (We are well aware of the fact that over the past twenty years state court judges have become much more sensitive to constitutional requirements, although we cannot help but note that this may be, at least in part, for some judges, because of the knowledge that federal judges were looking over their shoulders. The ACLU understands that on many issues the highest state courts of the land are now more protective of civil liberties than is the Supreme Court.) Rather, we urge the committee to reject this legislation because it would have undesirable adverse consequences for the protection of liberty, and because we do not believe that the evils which were feared as a result of Pulliam have or will come to pass.

Let me deal briefly, first with the issue of injunctions and then with the question of attorney's fees.

Injunctive Relief

S. 1515, in addition to barring attorneys fees awards against judges, would also limit injunctive relief. We see no need for this change and believe that federal judges must be left with the discretion to enjoin state courts in the extreme situations in which they would contemplate such action.

Justice Blackmun writing for the Court in Pulliam stated the policy considerations which the ACLU believes are dispositive:

> "Our own experience is fully consistent with the common law's rejection of a rule of judicial immunity from

> prospective relief. We never have had a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence. None of the seminal opinions on judicial immunity, either in England or in this country, has involved immunity from injunctive relief against a judge. See n 6, supra. At least seven circuits have indicated affirmatively that there is no immunity bar to such relief, and in situations where in their judgment an injunction against a judicial officer was necessary to prevent irreparable injury to a petitioner's constitutional rights, courts have granted that relief.
>
> For the most part, injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards. The limitations already imposed by the requirements for obtaining equitable relief against any defendant--a showing [illegible] adequate remedy at law and of a serious ris[illegible] severely curtail the risk that [illegible] and their independence compromised by [illegible] defend themselve[illegible] against [illegible] by [illegible].
>
> * * *
>
> If the Court were to employ principles of judicial immunity to enhance further the limitations already imposed by principles of comity and federalism on the availability of injunctive relief against a state judge, it would foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm...."

(Pulliam, supra, 536-38,539; citations and footnotes omitted.)

The normal comity between judicial officers and the respect for federalism which the Supreme Court has recently emphasized will, we believe, lead federal judges to bend over backwards to avoid issuing injunctions against state judges except in the most egregious situations. In such cases, where a state judge is continually violating the constitutional rights of persons under his or her jurisdiction, the federal court should be free to enjoin the action. Where declaratory relief would be sufficient, we see no evidence to suggest that federal judges would not withhold an injunction until it proved necessary. But we see no reason to tie the hands of federal judges.

We have not seen any study since Pulliam of the instances in which state court judges were enjoined by the federal courts. We suspect that this is because there are few such cases, if any, and because the facts in any cases that may have arisen are sufficiently outrageous so as to justify the federal injunction. We suggest to the committee that nothing is broken here and nothing needs to be fixed. Only clear evidence that federal judges were abusing their injunctive powers should lead this committee to consider changing the law.

Attorney's Fees

As far as attorney's fees are concerned, our general view is the same-- nothing is broken and nothing needs fixing -- but our reasoning is different.

In enacting the Civil Rights Attorney's Fees Awards Act, Congress clearly intended to cover situations where the person sued was immune from damages. Pulliam, supra, 543-44. This is because the purpose of the statute is to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." H.R. Rep. No. 1558, 94th Cong.,2d Sess. 9 (1976). The goal is to insure that fees will be available to successful litigants so that cases can and will be brought.

From this perspective, costs and fees are not a substitute for damages as a device for deterring unconstitutional behavior. Thus, there is no reason why judges should be required to pay any such costs and fees assessed, and in practice they do not do so.

As far as we are aware, in every case in which fees and costs have been assessed against a state judge for actions taken in his or her judicial capacity, the fees have been paid by the state and not by the judge personally. The ACLU has no objection to this procedure. We believe that most states already have procedures which provide legal counsel to judges who are sued and which provide for indemnification directly by the state or by insurance for any costs and fees which are assessed. If there are any states without such a procedure, they should change their laws to adopt such procedures instead of seeking to change the Pulliam rule.

The ACLU opposes this legislation not because we want the judges to pay attorney's fees, but because we fear that in many situations it would mean that no one would pay. Since the Eleventh Amendment stands as a bar to suing a state for costs for an action by a state judge, if the judge is made immune by legislation there would often be no party who could be sued for costs. There is no reason to believe that the states would continue to pay these costs if the judge would not otherwise be personally liable.

Since judges now do not end up personally paying costs and fees assessed against them, we do not believe that the current system affects the behavior of sitting state judges either by making them more sensitive to constitutional rights or less willing to act in other cases for fear of being sued. We have seen no evidence that the threat of fees, any more than the threat of an injunction, has had a chilling effect on the behavior of state judges.

If state judges feel that it is somehow undignified for them to be held liable for costs even if they are then paid by the state, the remedy is simple. States should consent to be sued for costs and fees under the Civil Rights Attorney's Fees Awards Act for fees arising out of actions by state judges in their judicial capacity. The ACLU would gladly support an amendment to the Act which provides that state judges may not be sued, or held liable, for costs in any state in which the state has consented to be sued for such costs under the statute. We would be pleased to work with the committee and with other interested parties to work out such language if it would solve the problem.

Conclusion

It is important to bear in mind that we are dealing here with exceptional cases where state judges engage in actions which clearly violate constitutional rights. The cases which have led to the litigation discussed in this testimony involve practices such as non-consensual sterilization, the failure to appoint counsel, and violation of the right to bail. It is not surprising that judges like everyone else do not like to be sued. However, we need also to keep in mind the warning of Justice O'Connor speaking for a unanimous Supreme Court that "one can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious law suits can have on the judicial function than they are to similar dangers in other contexts." Forrester, supra, at 4069. Justice O'Connor went on to say that the courts "should be at least as cautious in extending those immunities as we have been when dealing with officials whose peculiar problems we know less well than our own." Id.

Congress should be equally cautious in reacting to pleas for relief which the court has rejected and from which no demonstrable harm has come. The ACLU urges the committee not to disturb the current equilibrium which has neither intimidated judges nor made suits to protect constitutional rights impossible to bring or to resolve favorably.

Alliance for Justice

A National Association of Organizations Working for Equal Justice

600 New Jersey Avenue, N.W. ■ Washington, D.C. 20001 ■ 202/662-9548

March 14, 1988

NAN ARON
Executive Director

FRANCES DUBROWSKI
Chair

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Women's Legal Defense Fund

The Honorable Howell Heflin
Chairman, Subcommittee on Courts and
  Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Heflin:

We appreciate the opportunity to comment on three bills (S. 1482, S. 1512, S. 1515) under consideration by the Subcommittee on Courts and Administrative Practice. Each would amend the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, by barring the award of attorneys' fees against judges or judicial officers in proceedings brought against them based on violations of constitutional and civil rights. We strongly oppose these attempts to overturn the Supreme Court's decision in Pulliam v. Allen, 466 U.S. 522 (1984), for essentially the same reasons that we opposed S. 1794 and S. 1795 when those similar bills were considered in 1985.

Specifically, the proposed measures would discourage victims of constitutional and civil rights violations from pursuing valid claims and would limit their access to highly qualified legal representation. Without the prospect of attorney fee awards, many victims of constitutional and civil rights violations would be unable to secure the services of a lawyer. Although many lawyers willingly represent low-income clients on a pro bono basis, fee awards are essential to ensure that all persons receive adequate representation when they suffer violations of their basic rights.

Those advocating the extension of judicial immunity have presented no objective quantifiable data in support of their assumption that Pulliam threatens the independence and integrity of state judges. Absent evidence to support this assumption, we urge that the Subcommittee refrain from recommending measures that would impair vindication of constitutional and civil rights.

We are also particularly concerned that S. 1512 and S. 1515 would extend judicial immunity to non-judicial acts by exempting from fee awards any actions based on acts taken by a judge in his or her official capacity. If adopted, either of these measures would grant judges license to disregard prevailing civil rights standards in making employment and other wholly administrative decisions. Even Justice Joseph Weisberger, who otherwise testified in support of the proposed legislation, eschewed exempting judges from standards applicable to others acting in an administrative capacity. We, too, see no reason to grant judges additional immunity for acts taken outside their judicial capacity.

Finally, we oppose the attempt in S. 1515 to restrict further the availability of injunctive relief in § 1983 actions against state judges. Federal courts have demonstrated appropriate restraint in dealing with requests for injunctive relief against judicial officials, and further restraint on the availability of such relief is unnecessary. Courts have repeatedly acknowledged that injunctions are available against state court judges only in carefully defined situations where there is "a showing of an inadequate remedy at law and of a serious risk of irreparable harm." *Pulliam*, 466 U.S. at 537 (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)). Congress need not erect additional barriers to the awarding of such relief.

We agree with the criticism of the proposed measures submitted by the American Civil Liberties Union and by the NAACP Legal Defense and Education Fund. In summary, we believe it is far more important to provide means by which individuals may pursue legitimate civil rights claims than to protect against unsubstantiated fears that a Supreme Court decision may adversely affect the integrity and independence of state judges.

Sincerely,

Nan Aron

Nan Aron
Alliance for Justice

Rosa D. Wiener

Rosa D. Wiener
Robert E. Richardson
Laura Macklin
Institute for Public Representation

cc. Sen. DiConcini
Metzembaum
Grassley
Thurmond

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FORRESTER *v.* WHITE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86–761. Argued November 2, 1987—Decided January 12, 1988

Respondent, an Illinois state-court judge, had authority under state law to appoint and discharge probation officers. After hiring petitioner as a probation officer and later promoting her, respondent demoted and then discharged her. Petitioner filed a damages action in Federal District Court under 42 U. S. C. § 1983, alleging that she was demoted and discharged on account of her sex in violation of the Equal Protection Clause of the Fourteenth Amendment. Although the jury found in her favor, the court granted summary judgment to respondent on the ground that he was entitled to absolute immunity from a civil damages suit. The Court of Appeals affirmed.

Held: A state-court judge does not have absolute immunity from a damages suit under § 1983 for his decisions to demote and dismiss a court employee. Pp. 3–11.

(a) Because the threat of personal liability for damages can inhibit government officials in the proper performance of their duties, various forms of official immunity from suit have been created. Aware, however, that the threat of such liability may also have the salutary effect of encouraging officials to perform their duties in a lawful and appropriate manner, this Court has been cautious in recognizing absolute immunity claims other than those decided by constitutional or statutory enactment. Accordingly, the Court has applied a "functional" approach under which the nature of the functions entrusted to particular officials are examined in order to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Even with respect to constitutional immunities granted for certain functions of Congress and the President, the Court has been careful not to extend the scope of protection further than its purposes require. Pp. 3–5.

(b) Judges have long enjoyed absolute immunity from liability in damages for their judicial or adjudicatory acts, primarily in order to protect judicial independence by insulating judges from vexatious actions by disgruntled litigants. Truly judicial acts, however, must be distinguished from the administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform. It is the nature of the function performed—adjudication—rather than the identity of the actor who performed it—a judge—that determines whether absolute immunity attaches to the act. Pp. 5–9.

(c) Respondent's decisions to demote and discharge petitioner were administrative rather than judicial or adjudicative in nature. Such decisions are indistinguishable from those of an executive branch official responsible for making similar personnel decisions, which, no matter how crucial to the efficient operation of public institutions, are not entitled to absolute immunity from liability in damages under § 1983. The Court of Appeals reasoned that the threat of vexatious lawsuits by disgruntled ex-employees could interfere with the quality of a judge's decisions. However true this may be, it does not serve to distinguish judges from other public officials who hire and fire subordinates. In neither case is the danger that officials will be deflected from the effective performance of their duties great enough to justify absolute immunity. This does not imply that qualified immunity, like that available to executive branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions, a question not decided here. Pp. 9–11.

792 F. 2d 647, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and SCALIA, JJ., joined, and in all but Part II of which BLACKMUN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 86-761

CYNTHIA A. FORRESTER, PETITIONER *v.* HOWARD LEE WHITE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 12, 1988]

JUSTICE O'CONNOR delivered the opinion of the Court.*

This case requires us to decide whether a state-court judge has absolute immunity from a suit for damages under 42 U. S. C. § 1983 for his decision to dismiss a subordinate court employee. The employee, who had been a probation officer, alleged that she was demoted and discharged on account of her sex, in violation of the Equal Protection Clause of the Fourteenth Amendment. We conclude that the judge's decisions were not judicial acts for which he should be held absolutely immune.

I

Respondent Howard Lee White served as Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court in Jersey County. Under Illinois law, Judge White had the authority to hire adult probation officers, who were removable in his discretion. Ill. Rev. Stat., ch. 38, ¶204-1 (1979). In addition, as designee of the Chief Judge of the Seventh Judicial Circuit, Judge White had the authority to appoint juvenile probation officers to serve at his pleasure. Ill. Rev. Stat., ch. 37, ¶706-5 (1979).

In April 1977, Judge White hired petitioner Cynthia A. Forrester as an adult and juvenile probation officer. Forrester prepared presentence reports for Judge White in adult offender cases, and recommendations for disposition and placement in juvenile cases. She also supervised persons on probation and recommended revocation when necessary. In July 1979, Judge White appointed Forrester as Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, a position that carried increased supervisory responsibilities. Judge White demoted Forrester to a nonsupervisory position in the summer of 1980. He discharged her on October 1, 1980.

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*JUSTICE BLACKMUN joins in all but Part II of this opinion.

Forrester filed this lawsuit in the United States District Court for the Southern District of Illinois in July 1982. She alleged violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and § 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983. A jury found that Judge White had discriminated against Forrester on account of her sex, in violation of the Equal Protection Clause of the Fourteenth Amendment. The jury awarded her $81,818.80 in compensatory damages under § 1983. Forrester's other claims were dismissed in the course of the lawsuit.

After Judge White's motion for judgment notwithstanding the verdict was denied, he moved for a new trial. The District Court granted this motion, holding that the jury verdict was against the weight of the evidence. Judge White then moved for summary judgment on the ground that he was entitled to "judicial immunity" from a civil damages suit. This motion, too, was granted. Forrester appealed.

A divided panel of the Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment. The majority reasoned that judges are immune for activities implicating the substance of their decisions in the cases before them, although they are not shielded "from the trials of life generally." 792 F. 2d 647, 652 (1986). Some members of a judge's staff aid in the performance of adjudicative functions, and the threat of suits by such persons could make a judge reluctant to replace them even after losing confidence in their work. This could distort the judge's decisionmaking and thereby indirectly affect the rights of litigants. Here, Forrester performed functions that were "inextricably tied to discretionary decisions that have consistently been considered judicial acts." *Id.*, at 657. Unless Judge White felt free to replace Forrester, the majority thought, the quality of his own decisions might decline. The Court of Appeals therefore held that Judge White was absolutely immune from Forrester's civil damages suit. In view of this holding, the court found it unnecessary to decide whether the District Court had erred in granting Judge White's motion for a new trial.

In dissent, Judge Posner argued that judicial immunity should protect only adjudicative functions, and that employment decisions are administrative functions for which judges should not be given absolute immunity.

In *Goodwin* v. *Circuit Court of St. Louis County, Mo.*, 729 F. 2d 541, 549 (CA8), cert. denied, 469 U. S. 828 (1984), the United States Court of Appeals for the Eighth Circuit held that a judge was not immune from civil damages for his decision to demote a hearing officer. We granted certiorari, 479 U. S. —— (1987), to resolve the conflict.

II

Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Such considerations have led to the creation of various forms of immunity from suit for certain government officials. Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity. See, *e. g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Butz* v. *Economou*, 438 U. S. 478 (1978); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U. S. Const., Art. I, § 6, cl. 1. Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require. See, *e. g.*, *Gravel* v. *United States*, 408 U. S. 606, 622–627 (1972); see also *Hutchinson* v. *Proxmire*, 443 U. S. 111, 123–133 (1979); *Doe* v. *McMillan*, 412 U. S. 306 (1973); *United States* v. *Brewster*, 408 U. S. 501 (1972); *United States* v. *Johnson*, 383 U. S. 169 (1966); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). Furthermore, on facts analogous to those in the case before us, the Court indicated that a United States Congressman would not be entitled to absolute immunity, in a sex-discrimination suit filed by a personal aide whom he had fired, unless such immunity was afforded by the Speech or Debate Clause. *Davis* v. *Passman*, 442 U. S. 228, 246 (1979); see also *id.*, at 246, n. 25 (reserving question of qualified immunity).

Among executive officials, the President of the United States is absolutely immune from damages liability arising from official acts. *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982). This immunity, however, is based on the President's "unique position in the constitutional scheme," *id.*, at 749, and it does not extend indiscriminately to the President's personal aides, see *Harlow*, *supra*, or to cabinet level officers, *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). Nor are the highest executive officials in the States protected by absolute immunity under federal law. See *Scheuer* v. *Rhodes*, *supra*.

III

As a class, judges have long enjoyed a comparatively sweeping form of immunity, though one not perfectly well-defined. Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error. See Block, *Stump v. Sparkman* and the History of Judicial Immunity, 1980 Duke L. J. 879. More recently, this Court found that judicial immunity was "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." *Bradley* v. *Fisher*, 13 Wall. 335, 347 (1872). Besides protecting the finality of judgments or discouraging inappropriate collateral attacks, the *Bradley* Court concluded, judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants. *Id.*, at 348.

In the years since *Bradley* was decided, this Court has not been quick to find that federal legislation was meant to diminish the traditional common law protections extended to the judicial process. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S. 547 (1967). On the contrary, these protections have been held to extend to executive branch officials who perform quasi-judicial functions, see *Butz* v. *Economou*, *supra*, at 513–514, or who perform prosecutorial functions that are "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman*, 424 U. S. 409, 430 (1976). The common law's rationale for these decisions—freeing the judicial process of harassment or intimidation—has been thought to require absolute immunity even for advocates and witnesses. See *Briscoe* v. *La Hue*, 460 U. S. 325 (1983); *Butz* v. *Economou*, *supra*, at 512.

One can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious law suits can have on the judicial function than they are to similar dangers in other contexts. Cf. *Butz* v. *Economou*, *supra*, at 528, n. (REHNQUIST, J., concurring in part and dissenting in part). Although Congress has not undertaken to cut back the judicial immunities recognized by this Court, we should be at least as cautious in extending those immunities as we have been when dealing with officials whose peculiar problems we know less well than our own. At the same time, we cannot pretend that we are writing on a clean slate or that we should ignore compelling reasons that may well justify broader protections for judges than for some other officials.

The purposes served by judicial immunity from liability in damages have been variously described. In *Bradley* v. *Fisher*, *supra*, at 348, and again in *Pierson* v. *Ray*, *supra*, at 554, the Court emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. As Judge Posner pointed out in his dissenting opinion below, this is the principal characteristic that adjudication has in common with legislation and with criminal prosecution, which are the two other areas in which absolute immunity has most generously been provided. 792 F. 2d, at 660. If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. *Id.*, at 660–661. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. Nor are suits against judges the only available means through which litigants can protect themselves from the consequences of judicial error. Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability.

When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.

This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform. Thus, for example, the informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character. See *Stump* v. *Sparkman*, 435 U. S. 349, 363, n. 12 (1978). Similarly, acting to disbar an attorney as a sanction for contempt of court, by invoking a power "possessed by all courts which have authority to admit attorneys to practice," does not become less judicial by virtue of an allegation of malice or corruption of motive. *Bradley* v. *Fisher*, *supra*, at 354. As the *Bradley* Court noted: "Against the consequences of [judges'] erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort." *Ibid.*

Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts. In *Ex Parte Virginia*, 100 U. S. 339 (1880), for example, this Court declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts. The Court reasoned:

> "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as

> well have been committed to a private person as to one holding the office of a judge. . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?" *Id.*, at 348.

Although this case involved a criminal charge against a judge, the reach of the Court's analysis was not in any obvious way confined by that circumstance.

Likewise, judicial immunity has not been extended to judges acting to promulgate a code of conduct for attorneys. *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719 (1980). In explaining why legislative, rather than judicial, immunity furnished the appropriate standard, we said: "Although it is clear that under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking." *Id.*, at 731. Similarly, in the same case, we held that judges acting to enforce the Bar Code would be treated like prosecutors, and thus would be amenable to suit for injunctive and declaratory relief. *Id.*, at 734–737. Cf. *Pulliam* v. *Allen*, 466 U. S. 522 (1984). Once again, it was the nature of the function performed, not the identity of the actor who performed it, that informed our immunity analysis.

IV

In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other executive branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.

The majority below thought that the threat of vexatious lawsuits by disgruntled ex-employees could interfere with the quality of a judge's decisions:

> "The evil to be avoided is the following: A judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decision-making will decline." 792 F. 2d, at 658.

There is considerable force in this analysis, but it in no way serves to distinguish judges from other public officials who hire and fire subordinates. Indeed, to the extent that a judge is less free than most executive branch officials to delegate decisionmaking authority to subordinates, there may be somewhat less reason to cloak judges with absolute immunity from such suits than there would be to protect such other officials. This does not imply that qualified immunity, like that available to executive branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions. See, *e. g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Davis* v. *Scherer*, 468 U. S. 183 (1984). Cf. *Harlow* v. *Fitzgerald*, 457 U. S., at 818. Absolute immunity, however, is "strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great." 792 F. 2d, at 660 (Posner, J., dissenting). The danger here is not great enough. Nor do we think it significant that, under Illinois law, only a judge can hire or fire probation officers. To conclude that, because a judge acts within the scope of his authority, such employment decisions are brought within the court's "jurisdiction," or converted into "judicial acts," would lift form above substance. Under Virginia law, only that State's judges could promulgate and enforce a Bar Code, but we nonetheless concluded that neither function was judicial in nature. See *Supreme Court of Virginia* v. *Consumers Union*, *supra*.

We conclude that Judge White was not entitled to absolute immunity for his decisions to demote and discharge Forrester. In so holding, we do not decide whether Judge White is entitled to a new trial, or whether he may be able to claim a qualified immunity for the acts complained of in Forrester's suit. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Senator **Heflin**. Well, if State judges are to have this qualified immunity, do you think the same rule should apply to the Federal judiciary?

Mr. **Halperin**. Yes. I think that every public official ought to be liable for damages if he or she does something which violates clearly established constitutional law.

That's now the law of qualified immunity as the courts laid it out. If it's good enough for the Cabinet, if it's good enough for Governors, if it doesn't prevent them from doing their duty, I don't believe it will prevent State judges from doing their duty.

Senator **Heflin**. In other words, you believe Federal judges should be subject to injunctive relief and fee awards in cases of alleged violations of Federal constitutional torts?

Mr. **Halperin**. Where a Federal judge has taken an action that violates clearly established constitutional rights, I think he or she should be subject to the same penalties as anybody else.

Senator **Heflin**. In your prepared statement, you urge the committee to reject this legislation, because it would have undesirable, adverse consequences for the protection of liberty. Could you please elaborate on what those undesirable adverse consequences will be.

Mr. **Halperin**. Well, the two adverse consequences are, first, as far as injunctions are concerned—it would prevent Federal judges from enjoining State actions in, as Justice Blackmun described it, those rare cases where there was irreparable injury and the Constitution required the judge to enjoin the action.

Now, that would obviously only be in a case where a State judge was persisting in a course of conduct which in the view of the Federal judge violated the Constitution and could not be stopped by declaratory action.

Now, the legislation, in effect, says the same thing, because it says you can issue an injunction where a declaration won't be sufficient.

I think that's the current situation, that a Federal judge is only going to enjoin a State judge where an injunction is necessary for that purpose and that that ought to be left in that situation.

As far as the attorneys' fees are concerned, the problem is, as I've said, you have violations where there may not be attorneys willing to take the cases or able to take the cases without fees.

And that's the reason the Congress enacted the fee statute because it recognized that under the Supreme Court decision which did not permit fees cases would not be brought, people's constitutional rights would not be protected and the consequence of this legislation would be to create those situations.

Senator **Heflin**. I assume you would agree with me that the independence of the judiciary has done more to establish individual rights and freedom under the Constitution than any other body of government.

Mr. **Halperin**. Absolutely.

Senator **Heflin**. In measuring the effect that the judiciary, through its independence, has had on the establishment of individual rights, don't you feel that this matter erodes the independence of the judiciary in regards to potential constitutional rights and liberties that might be established by the judiciary in the future.

Mr. HALPERIN. I don't see how and I don't—I must say the examples we were given this morning I found unpersuasive.

You can only sue under these statutes for alleged violations of constitutional rights. And the notion that a State judge will be less willing to take action that protect constitutional rights because he or she fears there will be a lawsuit alleging violations of constitutional rights can only come up at all in a situation where there are two competing constitutional rights that are at stake.

And those are not common or typical situations. Those are not cases where the courts have played a lead role in this area. So, I must say I am very puzzled by the notion.

I can imagine that it would lead State judges to be more solicitous of constitutional rights, to be less willing to lock people up when they ought not to do so because they fear lawsuits.

But if the consequences of the fear of litigation is to have State judges more sensitive to constitutional rights, then I would view that as an advantage of the current situation and not a disadvantage.

But I must say that if we were persuaded that this legislation was necessary to protect the independence of the State judiciary, then we would be strong supporters of this legislation, but we're not at all persuaded of that.

Senator HEFLIN. Well, I can imagine quite a scenario of types of cases that could have arisen in my state against Judge Frank Johnson.

They may not have had any merit to them, but he may well have been facing many vexatious types of lawsuits if this had prevailed at the time and if he did not have immunity.

Of course, *New York* v. *Sullivan,* while it was against a city commissioner, gives some illustration of some danger that could exist as to affecting the independence of the judge on constitutional rights in a setting in which his decisions met with tremendous opposition from a segment of the population.

Maybe you won't have a situation like that arise in the future, but I can imagine that there could have been all sorts of lawsuits.

I do not think it would have affected his decisions or his independence, but it could have on some.

Mr. HALPERIN. Well, but, I think we have to ask, what are the two changes that would take place if this legislation was adopted?

You could still sue State judges. You would just have to first ask for a declaration for an injunction, but you could still ask for an injunction if you thought the declaration wasn't working.

So, as far as the vexatious and taxing litigation on a Federal judge looking over the shoulder of a State judge, insofar as that's possible and insofar as Federal judges may abuse that authority, they would have it even if this legislation was adopted.

Senator HEFLIN. Well, I'm just saying if it's extended, as you would say, to Federal judges and it had been at that particular time, I think Judge Johnson would have been faced with many many vexatious types of lawsuits similar to the type that was brought in *New York* v. *Sullivan.*

Mr. HALPERIN. You're talking about Federal judges?

Senator HEFLIN. I'm talking about Federal judges, Judge Johnson, himself, being sued and whether or not this could have an erosion upon the independence of judges like him. That's what I'm talking about.

It would not necessarily be that the end result would have been that he would have been enjoined or that attorneys' fees would have been allowed, but the constant threat of lawsuits being brought against him, whether or not on a judge who had less backbone, that could have some type of erosion of his independence. That's what I'm speaking about.

As I see it, the independence of the judiciary has really, in effect, made your organization and I think this thing is a serious question as to whether or not in the long run with a few isolated instances, in which there would be injustices, whether or not those isolated instances of injustice outweigh the erosion that could take place in the independence of the judiciary. That's the question in my mind.

Mr. HALPERIN. I agree that that's the question. I mean, our view is that we believe that judges will get over the shock of this initial decision and that they will discover, as State Governors have, as Cabinet officers have, when you have qualified immunity, as well as being subject to attorneys' fees, that you get over it and you come to recognize that the threat of litigation is something that affects most of us in our lives, but we end up doing what is right and what our duty requires and if we get sued, we deal with it.

Now, I think, as I said, the way to deal with it here is to make sure that State judges have attorneys that are paid for by the State and have the court costs and fees paid for by the State.

And I think the States ought to do that, they have an obligation to do that, and that Congress ought to encourage them to do it by passing the kind of legislation that I've suggested.

Senator HEFLIN. Thank you, sir. We appreciate it.

Mr. HALPERIN. Thank you. Appreciate the opportunity.

Senator HEFLIN. We are adjourned.

[The subcommittee was adjourned at 12:14 p.m.]

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